



Usul al Fiqh

Principles of Islamic Jurisprudence

أصول الفقه الإسلامي

Syed Iqbal Zaheer

Usūl al-Fiqh

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(Islamic Principles of Jurisprudence)

Syed Iqbal Zaheer



east west educational tools

Bangalore, India

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Bangalore 560 005
INDIA

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First Print, November 2012

ISBN 978-81-910531-0-4

Distributors:
Iqra Welfare Trust
No. 43, Dickenson Road,
Basement Floor,
Bangalore - 560 042
Ph: (0091-80) 4113 3504
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IQRA Publications
332, First Floor,
Darus Salam Bldg., Queens Road,
Bangalore 560 052
INDIA
Tel: (0091-80) 22289305

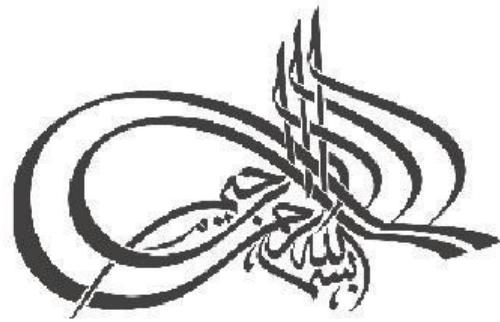


Table of Contents

Chapter-1:	Introduction	1
Chapter-2:	Working of the <i>Fiqh</i> Principles	5
Chapter-3:	The Seeds of <i>Usūl al-Fiqh</i>	17
Chapter-4:	Codification of <i>Usūl al-Fiqh</i>	23
Chapter-5:	The Topics of Discussion	27
Chapter-6:	Sources of Islamic Law	37
Chapter-7:	Sources of <i>Usūl al-Fiqh</i>	39
Chapter-8:	A Few Rules for Deriving the Meanings	51
Chapter-9:	<i>Al-Dalālat</i>	57
Chapter-10:	A Few General Rules	59
Chapter-11:	Differences Among the <i>Fuqahā'</i>	63
Chapter-12:	Are <i>Fiqh</i> Schools a Cause of Division?	71
Chapter-13:	Are <i>Fiqh</i> Schools Sects?	75
Chapter-14:	Do the Schools Strictly follow their <i>Imams</i> ?	77
Chapter-15:	Is <i>Taqīd</i> Unnecessary?	79
Chapter-16:	When is <i>Taqīd</i> Disallowed?	83
Chapter-17:	Choosing Rulings from Several Schools	85
Chapter-18:	Did the <i>Imams</i> Recommend Discarding of their Rulings?	87
Chapter-19:	Did the <i>Imams</i> Lack Knowledge of <i>hadith</i> ?	93
Chapter-20:	Did the <i>Imams</i> Use Weak <i>ahādith</i> ?	95
Chapter-21:	Does <i>Taqīd</i> Lead to Stagnation?	98
References		101

Chapter 1

INTRODUCTION

Also rendered into English as the “Principles of [Islamic] Law” it stands for that discipline which deals with the basis, or principles, by which the Law is derived in Islam; such principles themselves being derived from the Islamic sources (primarily, the Qur’an and *Sunnah*, and secondarily, reason and logic).

The discipline is unique to Islam. In other legal systems, the sources are not Divine and, the very first sources, which are inherited generation after generation, are unknown. In other words, laws in other systems have been inherited from tribal times, until the modern, approved by collective consent (although the term “collective consent” has a question mark before it). For example, the American Law was developed in England, and brought to the USA by the colonists. Court rulings, governmental legislations, city council, municipal and other ordinance makers, administrations, etc. add on to the law in USA – or for that matter, is what happens in any country. These laws are fluid and keep changing to meet contemporary conditions. As for the origins of the very first laws, nobody can identify a single respectable source.

Man-made Laws

Ancient men living in caves and forests, perhaps, agreed on what is NOT acceptable to society and, hence, punishable: rape, murder, stealth, treachery to the tribe, etc. These were the very first sources for Ur-Nammu (of Sumaria [Iraq] 2100 years before Christ), or of Hammurabi’s Code (Babylonia [Iraq] 1800 years before Christ) from which the Greeks, Romans, or Persians would have heavily borrowed. Water

Boarding torture, officially approved and applied in the US Naval Base, Guantanamo Bay, comes directly from the codes of Ur-Nammu and Hamurabi. The question of “Principles of Law,” therefore, does not arise in their case.

We used the term “collective consent,” but actually, barring the basic principles of civilized life, most other laws have been made by a minority, and enforced upon the rest. Tax laws, for instance, or family laws, have been generated by a minority, and imposed upon the unwilling rest, who keep finding ways to escape from these laws – because the majority does not approve of them. A recent example is legalization of homosexuality. At best, 10% of Americans are homosexuals. Further, it is an unnatural practice. Yet, despite the disapproval of the majority, its legality has been imposed on the nation. On the contrary almost 100% males are polygamous. So, it is natural. But the law disallows it totally. A careful scrutiny reveals that most modern laws are against morality and human nature. This tells us partly why the people – throughout the world – tend to be lawless, and the chaos increases by the day.

The Problem with Man-made Laws

It is universally recognized that ants or monkeys cannot make laws for themselves, because they cannot subject themselves to a study from outside. They are disqualified from understanding *themselves*, and, consequently, cannot generate laws for themselves.

The above applies, though not equally, to the humans. Because they have larger brains, and are capable of rationalization, they do not qualify for making laws for themselves. This is because they cannot make an objective study of themselves. They can never come out of being humans, study themselves from outside, and so, will remain

subjective, and, consequently, cannot write laws for themselves. They need an external authority, which can only be divine. They can make traffic rules because they can stand apart from the traffic on the roads, study its dynamism, flow, dangers, etc., and make rules. But, a group of them cannot stand apart, observe human life, behavior, needs, hopes, aspirations, fears, inter-relationships, etc., to say, for example, what the rights and duties of women, or husbands, or the State should be.

The Law's interference is required when someone tyrannizes over another. If humans are asked to make the law, the law becomes an additional tyrannizing element. Islam reduced the power of the parent, house, family, clan, tribe, state, and commonwealth; and freed man from their tyranny by introducing its own laws.

We might warn, however, that Islamic Law functions together with the moral and spiritual laws generated by it with equal emphasis. If, for instance, its moral laws are ignored, a society following Islamic law will face the problem of drawing its full benefits; although, we might hasten to add that Islamic Law has such qualities that it could be applied by any nation without having to believe in its Divine origins even if full benefits are not obtained because of the denial. Islamic Law is a time-tested set of laws.

The advantage of the "Principles of Law" as developed by the Islamic Jurists is that it allows for any individual of any age to scrutinize and criticize it. If it does not agree with Reason and Revelation, he can challenge the "Principles of Law" and the law itself.

Whenever studied by other than Islamic legal experts, they have been impressed by the rigorousness of the Principles, meticulous application of logic, and freedom of the Law from loopholes – characteristics the absence of which the lawyers in

other systems skillfully exploit to get criminals off the hook. In contrast, thanks to the meticulously worked out *fiqh* principles, in Islamic law, all escape routes are firmly closed.

Chapter 2

WORKING OF THE *FIQH* PRINCIPLES

An Example

At this point, let us offer a simple example of how this Islamic discipline works. The Qur'an says (7: 31),

وَكُلُوا وَاشْرَبُوا وَلَا تُسْرِفُوا إِنَّهُ لَا يُحِبُّ الْمُسْرِفِينَ ﴿٣١﴾ [الأعراف: ٣١]

“Eat and drink, but do not commit excesses; He does not approve of those who commit excesses.”

It also says (3: 137),

قَدْ خَلَتْ مِنْ قَبْلِكُمْ سُنَنٌ فَسِيرُوا فِي الْأَرْضِ فَانظُرُوا كَيْفَ كَانَ عَاقِبَةُ الْمُكْذِبِينَ ﴿١٣٧﴾ [آل عمران: ١٣٧]

“The law (of Allah) has been (the same) earlier. So, go about in the land and see how was the end of those who laid the lie (against the truth).”

Application of the *fiqh* Principles to the above verses has led the jurists to the rules that:

- 1) Eating and drinking is not *fard* (a religious obligation, punishable if ignored);
- 2) Committing excesses is *haram* (prohibited and punishable); and
- 3) “Tourism is only conditionally allowed.”

One may ask, ‘How is it that the text commands (eat and drink) and prohibits (do not commit excesses), but one is declared a non-*fard*, while the other is declared prohibited?’ And, ‘How come the Qur'an allows going about in the land, but the law says that “tourism is only conditionally allowed”?’

The answer is that there are thousands of commands and prohibitions contained in the source texts (primarily, the Qur'an and *Hadith* [or *Sunnah*: the Prophetic practice]). If every command or prohibition is treated as mandatory, people's lives would be rendered miserable. Therefore, the exact nature of the commands or prohibitions will have to be determined: whether they are obligatory, conditional, strongly recommendatory, merely advisable, or of some other nature. It is a thorough study of the texts, in the light of rules and principles of Law that will determine the nature of commands or prohibitions.

To explain, with regard to 'eating and drinking,' there is nothing in the texts to indicate that it is a religious obligation. The texts do not give details such as: it is *fard* (mandatory) to eat – once, twice, thrice a day, or in this or that quantity, or, vegetables or meat, of this or that quality, etc. – while, to treat any commanding text in the sense of a *fard* (obligatory), these conditions will have to be stated. If we said to someone, 'eating and drinking is an obligation on you,' he might immediately ask, 'how many times a day?' and we will have no answer. Further, the text does not state the punishment if the command is ignored.

On the other hand, committing excesses is declared *harām* (prohibited) because firstly, Allah said that He does not approve of it, and, secondly, it is stated at another place in the Qur'an that those who commit excesses are brothers of the devils (17: 27). So, the threat turns it into prohibitory.

With reference to tourism, firstly, the verse is addressing the unbelievers. It is asking them to learn a lesson. However, this can as well be learnt from word of mouth, published literature, or, from a commentary of the Qur'an. But, if they so wish, they could travel to those places which received Divine punishment. As for Muslims, the Prophet has prohibited that they visit places where Allah's punishment descended in the past, "unless," the Prophet added, "You may only go there weeping" – which is well-nigh impossible, but for a few. Therefore, despite the Qur'anic

recommendation, a Muslim may not travel to such places. (The question about touring places where Allah's punishment did not descend requires some explanation; therefore, we close the issue here).

Thus, extracting the Law from the sources required a set of rules and principles, which were efficiently worked out by Muslim jurists (*fuqahā'*, sing. *faqīh*) of the second century of Islam.

The Need

It is often asked in our times: Why did the scholars have had to take this trouble, when the Qur'an and *Sunnah* were there? The people could have resorted to directly consulting them just as the Muslims of the first century did. Had not the Prophet said (Muslim), "I am leaving behind me two things. So long as you hold on to them firmly, you will never be misguided: the Qur'an and the *Sunnah*"? So, why should the *Fuqahā'* of the earliest times have bound the people to the laws and methodology that they developed?

Such questions are raised by simplistic minds. What they fail to discern is that when the Prophet said, "I am leaving behind me..." to the end of the *hadith*, he was identifying the sources of Islamic Law for the future legal men, and the need to be faithful to the two in word and spirit. He did not mean that every individual Muslim was necessarily required to work out the Law for himself.

Such questions are also raised because people do not realize that Islam is a complete religion; and a complete religion requires laws that embrace every activity of life, state, and culture. Islamic Law is the equivalent of constitutional and civil laws combined together that other nations follow. And constitutions, or laws, are not codified by laymen. Among the elite too, it is only the specialists who can attempt it.

Further, the Prophet could not make a statement against the Qur'an. It said (16: 43),

فَسْئَلُوا أَهْلَ الذِّكْرِ إِنْ كُنْتُمْ لَا تَعْلَمُونَ ﴿٤٣﴾ [النحل: ٤٣]

“Therefore, ask the ahl al-dhikr (people of knowledge) if you do not know.”

How could the Qur'an open the door for the *Ahl al-Dhikr*, but the Prophet restrict it to the Qur'an and *Sunnah*? And, we can ask ourselves, how come the Qur'an opened the door for the *Ahl al-Dhikr*, but we open it for everyone: believer, unbeliever, trained and untrained, pious and vicious?

The Qur'an also said (4: 59),

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأَطِيعُوا أَوْلِيَ الْأَمْرِ مِنْكُمْ [النساء: ٥٩]

“O those who have believed! Obey Allah, obey the Messenger, and those of authority among you.”

The Qur'an directs the believers to consult ‘those of authority’. The Prophet could not instruct his followers to remain within the two sources, the Qur'an and the *Sunnah* alone.

Thus, the *hadith* about holding fast unto the Qur'an and *Sunnah* needs to be properly understood.

In addition, it might be said that although there are a small number of intelligent and talented men and women in every human society, the great majority, of every age, comprises of the blind, the handicapped, the naïve, the vulgar, the very old, the juvenile, the parasites, the criminal-minded and a variety of simple-minded folks of the slums and countryside who neither know the art of life or culture, nor are capable of reasoning beyond a single step in logic. They have neither time, energy, ability, nor the interest to attempt any calling more than earning the day's wages. If Islam is to be followed by one and all, universally, and peace to prevail, it cannot place the demand

on every individual of every society to work out guidance from the Qur'an and *Sunnah* for himself or herself. If the ordinary people of any region are asked to extract the laws in order to remain faithful to Islam, they would, as a body, respond that since they are being asked to do what is beyond their capacity (*viz.*, a scholarly study of the Qur'an and *Sunnah*), they should not be held responsible for ignoring Islam altogether.

The Prophet's Example

Accordingly, during his time, the Prophet did not send the Qur'an and his *Sunnah* to the tribes that had embraced Islam, but rather asked them to shift to Madinah to learn Islam. He asked a few men of ability – generally the leaders – to visit Madinah for a short, or long, while in order to be educated and then depart. The majority that stayed back were required to learn Islam from the trained ones when they returned. In *Fiqh* terminology, the commoners of the tribes were *Muqallidin* (imitators) of their Islamically trained leaders.

Common sense, if allowed to prevail, leads us to this conclusion; but, in addition, we have the Prophet's other examples. It is reported that,

عَنْ مُحَمَّدِ بْنِ جَبْرِ بْنِ مُطْعِمٍ، عَنْ أَبِيهِ، قَالَ: أَتَتْ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ
 امْرَأَةٌ، فَكَلَّمَتْهُ فِي شَيْءٍ، فَأَمَرَهَا أَنْ تَرْجِعَ إِلَيْهِ، فَقَالَتْ: يَا رَسُولَ اللَّهِ، أَرَأَيْتَ إِنْ
 رَجَعْتُ فَلَمْ أَجِدْكَ - كَأَنَّهَا تَعْنِي الْمَوْتَ، قَالَ: «فَإِنْ لَمْ تَجِدِينِي فَاتِّبِ أَهْلَ بَكْرِ»
 (صحيح ابن حبان)

“A woman came to the Prophet and spoke about something. He asked her to see him later. She asked, ‘Messenger of Allah, do you see, supposing I did not find you?’ (meaning, ‘Supposing you are dead’). He answered, ‘If you do not find me, go to Abu Bakr.’”

We note here that he did not tell her, “Refer to the Qur’an and *Sunnah*,” but rather, “If you do not find me, go to Abu Bakr.”

Although the above report does not implicitly say that she was seeking a religious ruling, it is implied that it was something of that nature from another report which adds that he named `Umar after Abu Bakr.

Another Example

When it comes to religious guidance, a Prophet makes things as clear as the day in sunlight. Accordingly, we find another statement to the same effect, but more emphatic. He said,

عَلَيْكُمْ بِسُنَّتِي وَسُنَّةِ الْخُلَفَاءِ الرَّاشِدِينَ بَعْدِي تَمَسَّكُوا بِهَا وَعَضُّوا عَلَيْهَا بِالنَّوَاجِدِ
(الترمذي، ابو داود، ابن ماجه)

“Incumbent upon you is my *Sunnah*, and the *Sunnah* of the well-guided successors after me; adhere to them and hold on to them with your teeth.”

Obviously, the term ‘successors’ as used in the above *hadith* is applicable to those who combine in themselves the intellectual, moral, and spiritual qualities to the highest degree, with the first four religio-political successors included by default.

Further, with this statement, the Prophet added a secondary source to the primary sources of the Qur’an and *Sunnah*: the opinions of the rightly-guided.

Complications of the New Age

Some factors, however, delayed the appearance of the *fuqahā*’ who would use *Fiqh* principles to derive the Law until the second century. This is because, immediately after the life of the Prophet, until about a century, Muslim society was dominated by the Companions, their Followers, and their Successors. These

three generations were special and extraordinary, the likes of whom have not been witnessed by mankind since then. Robust in faith, vigorous in action, devotees deep into the night, fierce warriors by the day, ever ready to lay down their lives for Islam, honest to the core, pure of heart, sincere beyond blemish, scorers of this world, and lovers of the Hereafter. Brought up in faith by the Qur'an and *Sunnah*, they went more by their own sixth sense, rather than the stated command. Few problems were there in their society for details of the guidance to be worked out by the *fuqahā'*. The most untutored of them was more learned than the learned of the later times. Their exemplary piety and fear of Allah led them to the right course in anything they attempted. Those who interacted with them, felt belittled, to the degree of shame. There was no question of an altercation with them over a material issue. They were givers rather than takers. They needed no guidance. They were the Guides.

It should be obvious, however, that not all Companions of the Prophet or their successors were of one level in learning. Some did outshine the others in each of the three generation, and were generally consulted, or sought for guidance and instruction by others contemporary to them.

Jurists among the Companions

During the life-time of the Prophet (d. 632), he was the sole authority on all religious affairs, and issued rulings. Except for a few rare cases involving personal practice, none of his Companions issued any religious rulings. After him, there were some 130 from among the male and female Companions (*Sahaba* and *Sahabiyyat*, numbering over 100,000 men and women), who were prominent in the understanding of Islam and so, issued religious rulings in matters where no direct ruling could be obtained from the Qur'an and the *Sunnah* – until about 100-110 years after the Prophet, when the last one among them died. Among them there were some who stood out and were the acknowledged *fuqahā'* (legal

experts). They were widely sought for religious rulings, not only by the Successors (*Tabe'iyun*), but also by the non-specialist Companions. They were: `Umar b. al-Khattab, `Ali b. abi Talib, `Abdullah b. Mas`ud, `A'isha, the wife of the Prophet, Zayd b. Thabit, `Abdullah b. `Abbas and `Abdullah b. `Umar.

There were others, quite prominent in their own right, and, known for their learning and other good qualities, but who did not issue as many religious rulings as those named above. To name a few of this class: Abu Bakr al-Siddiq, `Uthman b. `Affan, Umm Salamah (the Prophet's wife), Abu Sa`id al-Khudri, Abu Hurayrah (whose main field was *Hadith*), Abu Musa al-Ash`ari, Sa`d b. abi Waqqas, Jabir b. `Abdullah, Mu`adh b. Jabal, `Abdullah b. `Amr b. al-`As, `Abdullah b. Zubayr, Salman al-Farisi, and a few others. Abu Bakr was the most learned among them, but did not issue many rulings.

Jurists among the Followers

These earliest *fuqahā'* produced hundreds of scholars from among their successors (known as *Tabe'iyun*, last of whom died 160 years after the Prophet). In the city of Madinah, there were seven, known as the Seven-Jurists (*al-fuqahā' al-Sab'*) who were widely respected for their learning and juridical qualities. They were: Sa`id b. al-Musayyib (d. 94 H), `Urwah b. Zubayr (d. 94 H), Qasim b. Muhammad b. Abi Bakr Siddiq (d. 103 H), Kharijah b. Zayd b. Thabit (d. 99 H), Abu Bakr b. `Abd al-Rahman (d. 91 H), Sulayman b. Yasar (d. 107 H), and `Ubaydah b. `Abdullah (d. 99 H).

Obviously, their equivalents were present in dozens in every major town: Makkah, Kufa, Basra, Dimashq, and others; and, by the time of the Successors to the Followers (*Taba' Tabe'iyun*) the numbers of those who could issue rulings reached hundreds. The period of the *Taba' Tabe'iyun* was from 160 years after the Prophet to 220 years.

The *Ahl al-Ra'i* and *Ahl al-Hadith*

From the beginning there were two views, two approaches, and two practices to the problem of Law. There were those who would follow the *Hadith* to the letter; and those who would rather use reason and logic to understand the texts and work out the instructions. The former came to be known as *Ahl al-Hadith*, while the latter as *Ahl al-Ra'i*. Both are misleading nomenclatures. *Ahl al-Hadith* were not those who ignored the Qur'an, nor were the *Ahl al-Ra'i* those who formed opinions independent of the Qur'an and *Sunnah*. (The accidental nomenclature problem exists in *Hadith* also. For instance, a *hadith* is called *Mawdu'* [fabricated] if it has a fabricator, or a common liar, in the chain of transmission. It should be obvious that the presence of fabricator, or liar, does not convert a narrative into a false report. In fact, there have been scholars who held respect for those *ahādith* that were labeled *Mawdu'*).

At all events, those who followed the *hadith* verbatim, strictly adhering to the text, referred to as *Ahl al-Hadith*, belonged mostly to Makkah and Madinah and other parts of Hejaz. One possible reason is that this area was not exposed to the massive changes, conflicts, revolutions, and cultural clashes that other areas, especially Iraq witnessed. They were led by the four '*Abadilah*: 'Abdullah b. 'Umar, 'Abdullah b. Zubayr, 'Abdullah b. 'Amr, and 'Abdullah b. 'Abbas, and a few others such as 'A'isha and Abu Hurayrah.

On the other hand, the school that gained currency in Iraq and, generally speaking, outside of the Hejaz and areas under its influence, believed that legal interpretations of the texts – the Qur'an and *Sunnah* – should have 'basis in reason, should take into account the best interests of the people, and should be backed by discernable wisdom' (Taha Jabir), in order that they are relevant to the demands of changing times and conditions, otherwise, they would be no longer valid. The foundation-layers of this school were: 'Umar b. al-Khattab, 'Abdullah b. Mas'ūd, a

greater number of Companions who settled in Iraq. They were followed by such of the *Taba'iyun* as: `Alqamah (d. 62 H), Ibrahim Nakha`i (d. 96 H), Hammad b. Sulayman (d. 120 H) the teacher of Imam Abu Hanīfah, and several others.

The *Fiqh* Schools

The presence of hundreds of legal specialists led to the need to combine their learning under one umbrella of knowledge. This was accomplished by several powerful figures, such as Imam Abu Hanīfah (d. 150 H), Sufyan Thawri (d. 161 H), Imam Awza`ee (d. 175 H), Imam Malik (d. 179 H), Sufyan b. `Uyaynah (d. 198 H), Imam Shafe`i (d. 204 H), Imam Ahmad b. Hanbal (d. 233 H), Abu Da`ūd Zāhiri (d. 270 H), and many others. [Looking at the dates above, one cannot fail to notice, to his comfort, that the first-phase codification of law by the leading *fuqahā'* had been achieved before the end of the golden period of Islam, that of the *Salaf* (pious predecessors), which happened in 220 H. To Allah is the praise due].

Of this, the school of Imam Abu Hanīfah was the first to emerge as an organized body of legal scholars. One could call it the first *Fiqh* Academy of Islam. The schools of others emerged later in the following centuries; but of them only three remained prominent apart from the *Ahnaf*: the Shafe`i, Maliki, and Hanbali. The rest did not find many followers from among the legal experts, generation after generation, and gradually their name and influence remained confined among the academicians and particularly those who took special interest in the study of *Fiqh*.

Historical Factors

To be fair, one might add that there were historical, rather than intellectual, reasons for the schools and methodologies of other than the four to die out: *Ahnaf*, *Shafe`iyyah*, *Malikiyyah* and *Hanbaliyyah*. For example, the *Hanafiyy Fiqh* based on the

principles and methodology laid down by Abu Hanīfah (d. 150 H), was fortunate to win appreciation of the Abbasid Kingdom. Mansur, the second *Khalifah* (d. 158 H) asked Abu Hanīfah to accept the chair of Chief Justice of the Empire. He refused, was jailed, whipped, released, again jailed, but kept refusing until he died in prison. (Some suspect he was poisoned).

[There are some interesting episodes in connection with Abu Hanīfah's confrontation with Mansur. In one of the sessions, Mansur demanded to know why was it that he was refusing? Abu Hanīfah answered that he did not see himself qualified enough. Mansur said, "You are lying." Abu Hanīfah answered, "Then, surely, I am not qualified. A lying man cannot be Chief Justice." It is said that once, he accepted the job to escape the punishments. The first day he took chair, two men came quarrelling over some money, with none having any clear proof. Abu Hanīfah asked the claimant, "Can you swear (that you deserve it)?" The man said yes, and was preparing to swear when Abu Hanīfah quickly stopped him from fear that if the man was lying, he would be punished by Allah. He gave him the amount he was claiming from his personal purse, and left the office in quite some haste, never to return].

At all events, after the death of both Abu Hanīfah as well as Caliph Mansur, the Abbasid Caliph Harun al-Rasheed (d. 193 H), offered the chair to Abu Hanīfah's leading pupil Abu Yusuf, who accepted the offer. With him in the Chief Justice chair, the Empire began to be ruled by the *Fiqh* of the *Hanafiyy* school of thought. That remained the situation for hundreds of years leading to the growth, development and perfection of the *Hanafiyy Madh-hab*. In later times, it was the *Madh-hab* of the Saljuqi Empire, the 'Uthmani (Ottoman) Caliphate, the Mughal Empire and other powers too, leading to its further development and predominance in Turkey, Iraq, Syria, Egypt, the Indian sub-continent and other places.

Thus, it can be said that the popularity and growth of the *Hanafiyy* school of thought has historical reasons. It is fair to guess

that had another *Madh-hab* been adopted by the great Empires, it would have as well developed and would have been as widely spread. This applies to other *Madhāhib* too.

But, of course, that did not prevent other legal academic activities. Scores of scholars of exceptional abilities kept appearing; and their advent led to the appearance of numerous differences in methodologies. At this juncture, therefore, we need to look into the ways adopted by the earliest jurists to arrive at religious rulings that they delivered.

Chapter 3

THE SEEDS OF *USŪL AL-FIQH*

3a. The Prophet

The precedence for the use of *Fiqh* rules was first set by no less than the Prophet himself. He asked Mu`adh b. Jabal, whom he was sending to Yemen, "How will you judge between the people?" Mu`adh replied, "By the Book of Allah." The Prophet asked, "What if you did not find a lead there?" He replied, "I shall judge by the *Sunnah* of His Messenger." He asked, "What if you did not find a lead there either?" He answered, "I shall apply my own reasoning." The Prophet thanked Allah for bestowing him with such able followers.

The Prophet's own practice was that whenever a new issue arose, he applied to the Qur'an. If he did not find an answer there, he deferred the answer and waited for the revelation to come touching the issue. On a few occasions when he did not find a direct answer in the Qur'an, and no relevant revelation came, he resorted to analogy known as *Ijtihad* or, to be precise, exercised *Qiyas*. When he did that, most of the time he arrived at an answer that had Allah's approval. This is because he understood the Qur'an quite thoroughly and was saved from errors by his high level of piety.

There were a couple of occasions when Allah did not agree with his opinion based on analogy. He was corrected by Him. The first such occasion was at Makkah involving `Abdullah b. Maktum, the blind, whom he had ignored while talking to the leaders of the Quraysh. This was disapproved by Allah (refer *Surah* 80). The second occasion was when he accepted Abu Bakr's opinion that the lives of the prisoners at Badr be spared, against `Umar's opinion that they all be beheaded in order to drive fear into the hearts of the rest of the pagans who had made

lives of the Muslims miserable. Sparing their lives was disapproved by Allah.

3b. The Companions

The period of the Companions ended by the end of the first century of Islam. The last of the *Sahabah* in Madinah was Sahl b. Sa'd Sa'idi who died in 91 H. The last of them in Kufa was Ibn abi Awfa whose real name was 'Alqamah b. Khalid. He died in 86 H. The last of the *Sahabah* to die in Basrah was Anas b. Malik who died in 91 H. The last of them to die in Dimashq was 'Abdullah b. Yusur; he died in 88 H, and the last of them to die in Makkah was 'Amir b. Wathilah who died in 100 H.

The scholars of this generation also generally based their rulings on the Qur'an and *Sunnah*. They first looked for the answers in the Qur'an. Not finding it there, they searched the *Sunnah*. During the search, they also appealed to those of the Companions who had the knowledge of the *Sunnah*, enquiring whether they had heard anything from the Prophet concerning the issue at hand. That failing, they used analogy.

To cite an example, the punishment for drinking wine – a crime that occurred perhaps twice or thrice during the life-time of the Prophet – was beating and flogging. The number of lashes was not specified. People participated during the lashing by abusing the drunkard, roughing him up, throwing shoes at him, etc. After the Prophet, when the question of number of lashes was brought before 'Ali, he said, "When a man gets drunk, he talks trash; and when he talks trash, he slanders. So give him the punishment given to a slanderer." Thus 80 lashes came to be prescribed as the punishment for drinking wine. It should be noticed that 'Ali arrived at the ruling with the help of analogy which had become one of the rules employed to extract rulings from the Qur'an and *Sunnah*.

‘Umar b. al-Khattab incorporated another rule when the question came up regarding the rights of a divorced woman during her *‘Iddah*: whether she deserved maintenance cost from her former husband or not? A woman reported that she was denied both maintenance as well as shelter by the Prophet when her case was presented to him. But ‘Umar would not accept her report saying, “We are not going to abandon a Qur’anic command because of a woman about whom we are not too sure whether she remembers correctly or has forgotten.” He ruled that a woman was to be provided food and shelter by her husband during the *‘Iddah*. In this manner, ‘Umar set in place another principle of Islamic Law: When a *hadith* contradicts the Qur’an, the Qur’anic injunction will prevail if reconciliation between the two sources is not possible.

Another example can be cited. Ibn Mas‘ūd said,

وقال بن مسعود كان رجوع الأنصار يوم سقيفة بني ساعدة لكلام قاله عمر بن الخطاب أنشدكم الله هل تعلمون أن رسول الله صلى الله عليه و سلم أمر أبا بكر أن يصلي بالناس قالوا نعم قال فأيكم تطيب نفسه أن يتزعه عن مقامه الذي أقامه فيه رسول الله قالوا كلنا لا تطيب نفسه بذلك

“On the day of dispute in the quarters of Banu Sa‘idah, over the question of who was most qualified to be the successor of the Prophet, ‘Umar’s words prevailed over the *Ansar*. He asked, ‘By Allah, are you aware that the Prophet ordered Abu Bakr to lead the Prayers?’ They said, ‘Yes, we are aware.’ He asked, ‘Then, which of you would like to pull him back from the position in which the Prophet placed him?’ They said, ‘None of us would like to do that.’”

With that Abu Bakr’s leadership was obtained, and ‘Umar demonstrated the use of *Qiyas* – which later became one of the principles and a source for working out law.

Although Abu Bakr issued few rulings, they bear the signs of rules and principles that the later *fuqahā'* embodied during the codification of the *Fiqh*-rules. When a son complained against his father over he taking away his (i.e., the son's) earnings, Abu Bakr instructed the father, "You may take from your son's wealth that alone which would be enough for your basic needs." The man protested, quoting the Prophet's remark which he had made addressing a son in a similar case,

أَنْتَ وَمَالُكَ لِأَبِيكَ

"You and your wealth belong to your father."

But Abu Bakr did not treat the "*lam*" of "*li-abik*" as possessive, but as that of "*Istihqāq*" (defining a 'right.'). Accordingly, he instructed the father, "Take that alone which will please Allah." Thus, he established the rule in *Fiqh* that, to determine the correct function of a grammatical particle (*lam*, *inna*, *innamā*, *min*, etc.) as they appear in the Qur'an or *Sunnah*, a *Faqih* will have to delve into the entire body of revealed knowledge.

This precedence deeply affected the methodology codified by the legal experts of later times. Their principles extensively discuss the functions of grammatical particles.

3c. The Followers (*Tabē'iyun*)

The generation that followed the Companions kept pace with them in piety and learning. For their legal scholars, the methodology in Law remained as that of their predecessors, except that they included their rulings as another source after the Qur'an, *Sunnah*, and *Qiyās* (analogy). That is, when they could find answer to a new issue neither in the Qur'an, nor in the *Hadith*, they sought help from the rulings of the prominent legal experts from among the Companions – especially when there happened to be consensus among them over an issue. It is only when they had exhausted the three sources that they resorted to analogy.

Noticeably, during the analogical exercise, they restrained themselves to the Qur'an and *Sunnah* as sources while looking for similarities with the case at hand. They did not look into the rulings of the Companions while searching for similarities. Thus, they established the *Fiqh* rule – which remains operative till today – that analogy has to be based on the Qur'an and *Sunnah* alone.

Another *Fiqh* principle that they introduced was that of *Ijma`*, i.e., consensus of the Companions. They used it as a trustworthy legal source and of authority. To the later scholars, consensus of any other generation, even if obtained, does not have a binding legal value. When they use the term consensus, they mean consensus of the Companions alone.

3d. The Successors (*Taba` Tabi`iyyun*)

By the time of the *Taba` Tabi`iyyun* (170-220 H), the *Fiqh* body had grown larger than what a single jurist could handle. This is because of the vast expansion of Islam, interactions with other cultures and civilizations, leading to exponential growth in problems, puzzles and predicament. It was natural that opinions began to vary depending upon which set of scholars from the Followers, a Successor-jurist decided to follow. Those in Madinah, for instance, were influenced by such scholars from among the Followers as Sa`eed b. al-Musayyib (d. 94), `Urwah b. Zubayr (d. 94), Salim (d. 106), Zuhri (d. 124), Yahya b. Sa`id (d. 143) and others. They adopted their opinions resolutely, whereas those at Kufa were influenced by the rulings issued by the followers of `Ali and Ibn Mas`ud such as Qadi Shurayh (d. 77), Sha`bi (d. 104), Ibrahim Nakha`ee (d. 96), `Alqamah (d. 62), Hammad (d. 120) and others.

3e. Another Factor

Yet another factor, and complicated beyond description, was that the world of Islam was changing at an extremely fast pace. As

mentioned in passing above, exposure to new cultures, contacts with new people of Persian, Iraqi, Syrian, Egyptian and African origins, entry of huge numbers of non-Arabs into Islam and into the Arab lands, at a scale never experienced any time in the past, (which eventually led to civil strife and wars - adding to confusion), was a phenomenon that gave rise to such social, economic, political, intellectual, cultural, philosophic, linguistic, and religious situations as to baffle the best of minds. Consequently, a maze of problems arose that had no direct solutions in the Qur'an and *Sunnah*. That is where the *fuqahā'* stepped in and accomplished the work of setting up such amazing *Fiqh* rules that exercise their influence, to some degree, even on the empirical reasoning of modern times, not to mention the huge impact on the unity of the *Ummah*. A glance at the history of Islam and Muslims tells us that without they binding the people to Law as worked out by them, divisionary forces among the Muslims would have split them into a million factions.

Chapter 4

CODIFICATION OF *USŪL AL-FIQH*

Imam Shafe`i (d. 204 H) was born in the year Abu Hanīfah died (150 H). By then, *Fiqh* activities were far advanced. Abu Hanīfah, for instance, had established a kind of Academy at Kufa. It had about 40 specialists in *Fiqh*. Among them were *Hadith* Doctors, language experts, masters of the discipline known as '*Asma*' *al-Rijal* (Narrator Evaluation), specialists in Logic, and all sorts of experts in several other discipline; but, of course, each one of them possessed juristic expertise as a common factor. Among them were such monumental figures as Abu Yusuf (d. 182 H), Imam Muhammad b. al-Hasan al-Shaybani (d. 187 H), Imam Zufar b. Hudhayl (d. 158 H), Yahya b. Sa`id al-Qattan (d. 198 H), `Abdullah b. Mubarak (d. 181 H) and several others. Led by Abu Hanīfah, they gathered together, on a daily basis, in the main mosque of Kufah. Problems and issues were brought up and a general discussion ensued. After exhaustive discussions, a decision was arrived at, and the outcome was recorded. Sometimes, an issue occupied a whole month before a decision could be taken. Thus, the school was the first to codify religious rulings of such quality as were far from easy to challenge. Some 50,000 issues (*Masā`il*) and their answers were committed to writing.

Obviously, the scholars followed certain rules and principles. These came to be known as the *Usul al-Fiqh*. The first *Hanafiyy* School did not make any special effort to write down the rules and principles they were employing to arrive at religious rulings. Imam Abu Hanīfah's methodology, as reported in his own words, was:

"I follow the Book of Allah, and if I find no solution there, I follow the *Sunnah* of the Prophet, peace be upon him. If I find no solution in either the Qur'an or the *Sunnah*, I follow whichever of the pronouncements of the *Sahābah* I prefer, and leave whichever I wish. If there is a pronouncement on a

particular matter by any of the *Sahabah*, I would not adopt any other opinion made by any other scholar. But, if I found a solution only in the opinion of Ibrahim (Nakha`i), Sha`bi, Ibn Sirin, Hasan al-Basri, `Ata (ibn abi Rabah), or Sa`id b. al-Musayyib, I would make *Ijtihad* just as they did.” (Taha Jabir)

When a courtier of Caliph al-Mansur tried to discredit Abu Hanifah by alleging that he used personal opinion (*ra`y*) extensively, he wrote to him:

“The situation is not as has been reported to you, O leader of the Faithful. I first consult the Book of Allah, then the *Sunnah* of the Prophet. (Not finding a solution) I refer to the judgments of Abu Bakr, `Umar, `Uthman and `Ali, and, thereafter, I refer to the judgments of the rest of the Companions of the Prophet. And, if there are any differences between their pronouncements, I resort to *Qiyas* (legal analogy).” [Taha Jabir]

The long and short of the above quotations is to point out that Abu Hanifah himself followed certain rules and principles of *Fiqh* which, obviously, would have expanded as he discussed the issues with his companions in the *Fiqh* Body he had created.

The first yet, who codified rules and principles of *Fiqh* and presented them in a book form, was Imam Shafe`i. This does not mean though that he was the first to use them; after all, as it has been said, people used logic before Aristotle penned its principles, and poets were saying poetry before Khalil compiled its rules. The book by Imam Shafe`i was titled *Al-Risalah*, and is still extant. Thereafter, other publications followed.

4.1. EARLY BOOKS ON USUL AL-FIQH

Among the followers of Imam Abu Hanifah’s methodology, there appeared such works on *Usul al-Fiqh* as *Usul* by Abu al-Hasan al-Karkhi (d. 340 H), *Usul* by Abu Bakr al-Jassas (d. 370), *Ta’sis al-Nazar* by Abu Zayd Dabbusi (d. 456 H), *Usul* by

Bazdawi (d. 483 H), *Al-Mabsut* (a massive work) by Sarakhsi (which he dictated from the prison), etc.

The rules established by Imam Shafe`i were further developed and amplified by those who followed his methodology and, hence, larger books appeared such as *Al-Mu`tamad* of Abul Hussein Muhammad b. Ali Basri (d. 413 H), *Al-Burhān* of Imam *al-Haramayn* Juwayni (d. 487 H), *Al-Mustasfa* of Imam Ghazali (d. 505 H), *Al-Mahsūl* of Imam Razi (d. 606 H), etc.

Ibn Taymiyyah (d. 728 H) who was a *Hanbaliyy*, wrote *Al-Qawā'id al-Nurāniyyah*, Ibn Rajab Hanbaliyy (d. 759 H) wrote *Al-Qawā'id*, and Ibn al-Qayyim (d. 751 H) penned down *Badāe' al-Fawā'id* – all on the Principles of *Fiqh* followed by Imam Ahmad b. Hanbal, and others.

Similarly, several books have been written following the Maliki methodology. Major Maliki works seem to be late in appearance, like those of the *Hanābilah*. Some are: *Al-Furūq* by Abu al-'Abbas Ahmad (d. 684 H), *Al-Is'āf* by Abu al-Hasan 'Ali (d. 912 H), *Idah al-Masālik* by Ahmad b. Yahya (d. 914 H), and others.

With the above as a short prologue, we can now look into what these *Fiqh* rules are.

4.2. The Importance of *Usul al-Fiqh*

We might remind that *Usul al-Fiqh* is the key to the knowledge of the *Shari'ah*. Those who have no knowledge of it, often make fundamental errors in their understanding, explanation, propagation and call to Islam. Most of the new sects that keep cropping up in the non-Arab world, are headed by those who know enough of the Arabic language to understand the Qur'an and *Sunnah*, but without the knowledge of the *Usul* run into muddy waters, taking along with them ignorant followers. No amount of perfume of *'Ibādah* or ideological mulling will get them rid of the pollution of the muddy pool.

Similarly, those thinkers and reformers – who did not undergo proper schooling in an institution where they could learn the *Usūl*, but were sincere, committed to Islam, and had widely read its literature, but made conceptual errors in their conclusions which reflected in their reform plans – sooner, or later, had their ideas failing their followers in the intellectual, moral and spiritual spheres.

Chapter 5

THE TOPICS OF DISCUSSION

This is a vast subject, requiring a study of decades, and, therefore, an effort to present it in a few pages is like trying to collect waters of a spring in a pot. We can only present a schematic view with the help of a few high-points:

This discipline tends to deal with the following four topics:

1. *Al-Hākim* (the commanding authority, or the law-giver) الحاكم
2. *Al-Hukm al-Sharʿī* (the legal command) الحكم الشرعي
3. *Al-Mahkūm Fihi* (the deeds commanded) المحكوم فيه
4. *Al-Mahkūm ʿAlayhi* (the incumbent, the obliged) المحكوم عليه

To explain as briefly as possible:

5.1. *Al-Hākim*

This deals with Allah as the sole Law-giver. He says in the Qurʿan (6: 57),

إِنَّ الْحُكْمَ إِلَّا لِلَّهِ [يوسف: ٤٠]

“Surely, the Command is for Allah alone.”

He also said (5: 48),

فَأَحْكُم بَيْنَهُم بِمَا أَنْزَلَ اللَّهُ [المائدة: ٤٨]

“And judge between them by what Allah has revealed.”

He also said (5: 44),

وَمَنْ لَمْ يَحْكَمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الْكَافِرُونَ ﴿٤٤﴾ [المائدة: ٤٤]

“And whosoever did not judge by what Allah has revealed, it is they who are the unbelievers.”

The Prophet as a *Shāre`*

In a lesser degree, the Prophet was also a *Share`* (or *Hakim*). When asked about Hajj, whether it was a yearly obligation, he replied, "Had I said 'yes,' it would have become a yearly obligation."

Reason (or Intellect)

One of the questions discussed quite in detail pertains to the human intellect. Can it be a *Hakim* (the commanding authority)? The answer is a firm 'no.' Human intellect is an essential tool for understanding the commands and the will of Allah. But, by itself, it cannot command or prohibit. One might consider: no intellect, however high, could work out the manner of the Islamic prayers (*Salāh*), or the unlawfulness of interest-bearing transactions (*Riba*).

This is the error, i.e. dependence entirely on reason, that the non-Islamic systems commit and, as a result, are in such internal and external chaos.

5.2. *Al-Hukm Al-Shar`i*

This deals with the things commanded or prohibited, and is the outcome of the entire study of the discipline called *Usul al-Fiqh*.

Broadly, the command is divided into two kinds: *al-Hukm al-Taklifi*, and *al-Hukm al-Wad`i*.

1. *Al-Hukm al-Taklifi*: The example of this type is: (i) *Iqamatu al-Salāh*, or, (ii) do not devour another's wealth, etc.

2. *Al-Hukm al-Wad`i*: The example of this type is: (i) determining the appearance of the moon to begin the fasts, or (ii) presence of witnesses as a condition during the marriage, etc.

1a. Kinds of *Al-Hukm al-Taklifi*

As should be apparent from 1 above, under this branch of the discipline, research is conducted to determine the exact nature of deeds: whether a deed is prohibited (*Harām*), undesirable (*Makruh*), desirable (*Mandub*), permissible (*Mabah*), an obligation (*Fard/Wajib*), true, false; or, whether it is a condition (*Shart*), or a means (*Sabab*), or preventive (*Māni`*), etc., to the end of the varieties in deeds. To discuss a few:

a. *Harām*

The Objective

The objective of the prohibitions in Islam is to safeguard a man's five essential rights *viz.*, (i) his physical body (ii) progeny (iii) wealth and property (iv) intellect, and (v) religion. Some would include honor as the sixth (but, perhaps, if the five are taken care of, the sixth is safeguarded).

Harām is the class of deeds which are prohibited by the Law-giver. The following are the conditions that the texts – Qur'an and *Sunnah* – have highlighted for a thing, or deed, to become *Harām*:

(1) Presence of negative-imperatives words of prohibition: e.g. (17: 32),

وَلَا تَقْرَبُوا الزَّيْفَ [الإسراء: ٣٢]

“Do not go near adultery.”

(2) Threat of punishment if committed: e.g. (2: 279),

فَإِنْ لَّمْ تَتَّعَلُوا فَأْذَنُوا بِحَرْبٍ مِنَ اللَّهِ وَرَسُولِهِ [البقرة: ٢٧٩]

“If you do not desist (from usury), then be informed of declaration of war by Allah and His Messenger.”

(3) Employment of the very words of prohibition: e.g. (2: 173),

إِنَّمَا حَرَّمَ عَلَيْكُمْ [البقرة: ١٧٣]

“It has been prohibited unto you...”

There are other conditions without which a thing cannot be declared *Harām*, but we drop them for the sake of brevity.

b. *Wajib/Fard/Rukn*:

Although the three are slightly different from each other, we combine them for brevity and say that it is that class of deeds which makes it necessary for an incumbent to perform. For a deed to become *Wajib*, the following conditions must be fulfilled:

1. The text making a thing, or act, *Wajib* should have used the imperative form (*Amr*) of address. But we might hasten to add that every imperative of the Texts is not imperative of the kind that makes the deed obligatory to perform. Other rules must be employed to determine the exact nature. For example, following certain syntax rules, it is not the imperative word in the *ayah*,

[البقرة: ١٩٦] وَأَتِمُّوا الْحَجَّ وَالْعُمْرَةَ لِلَّهِ [البقرة: ١٩٦] (“... and complete the Hajj and `Umrah for Allah”) which makes Hajj *Wajib*.

It is the words, [آل عمران: ٩٧] وَلِلَّهِ عَلَى النَّاسِ حِجُّ الْبَيْتِ [آل عمران: ٩٧] (“...and upon the people is pilgrimage to the House for Allah”) which makes it so; supported by a few *ahādith* dealing with the issue.

2. It must have used *Lamu al-Amr* in the text: e.g. (22: 29)

وَلِيَطَّوَّفُوا بِالْبَيْتِ الْعَتِيقِ ﴿٢٩﴾ [الحج: ٢٩]

“Let them circumambulate the house.”

3. It should be accompanied by a threat for not carrying out the command, e.g. the *hadith* (of Daraqutni):

اسْتَنْزَهُوا مِنَ الْبَوْلِ، فَإِنَّ عَذَابَ الْقَبْرِ مِنْهُ

“Avoid the pollution of urine, for it is one of the reasons of torture in the grave.”

4. If the text uses the word of the family *Kataba* (written [upon you]): e.g. (2: 183)

كُتِبَ عَلَيْكُمُ الصِّيَامُ [البقرة: ١٨٣]

“Fasts have been written on you.”

5. If it uses the word *Farada* (to make [something an] obligation), e.g. (66: 2)

قَدْ فَرَضَ اللَّهُ لَكُمْ تَحِلَّةَ أَيْمَانِكُمْ [التحریم: ٢]

“Allah has already ordained on you the dissolution of your oaths.”

One may note that no command (or imperative) can be declared as *Wajib* without meeting with one of the above conditions - in the least.

c. *Al-Amr* (Implications of the Imperative)

In this connection, *Usul* scholars discuss the forms of words that determine the class of actions. The imperative form, for instance, is commonly used in the texts to demand action. But, does the use of every such form make it obligatory to act upon? Rather not. The *Usul* scholars point out that imperative forms yield a variety of meanings. To give a few examples:

1. *Al-Wujub* الوجوب (Obligatory): Allah said in the Qur’an (6: 72),

أَقِيمُوا الصَّلَاةَ [الأنعام: ٧٢]

“Establish the Prayer.”

The context of the above passage tells us that the command/imperative here is of an obligatory nature, which is, of course, corroborated by other Qur’an/*Hadith* texts.

2. *Al-Nudb* الندب (Authorized): e.g. (24: 33)

فَكَاتِبُوهُمْ إِنْ عَلِمْتُمْ فِيهِمْ خَيْرًا [النور: ٣٣]

“So make a deal (of freedom) with them (the slaves), if you know any good in them.”

3. *Al-Ibaha* الإباحة (Permissible): e.g. (5: 2)

وَإِذَا حَلَلْتُمْ فَاصْطَادُوا [المائدة: ٢]

“If you have removed the Ihram, you may now hunt.”

That is, you may hunt after major rites of Hajj are over, if you so feel.

4. *Al-Tahdid* التهديد (Challenge): e.g. (41: 40)

أَعْمَلُوا مَا شِئْتُمْ [فصلت: ٤٠]

“Act (now) in whatever way you wish.”

That is, act now, in this world, you may act as you wish. It is in the Hereafter that you will be seized and punished.

5. *Al-Irshad* الإرشاد (Exhortation): e.g. (2: 282),

وَأَسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ [البقرة: ٢٨٢]

“And seek the testimony of two witnesses from among your men.”

That is, it is recommended that you seek the help of witnesses.

6. *Al-Ta`jeez* التعجيز (Powerlessness): e.g. (2: 23)

فَأْتُوا بِسُورَةٍ مِثْلِهِ [البقرة: ٢٣]

“Bring then, a chapter like it.”

That is, you will never be able to produce a chapter like that of the Qur'an.

7. *Al-Ihanah* الإهانة (Humiliating): e.g. (44: 49),

ذُقْ إِنَّكَ أَنْتَ الْعَزِيزُ الْكَرِيمُ ﴿٤٩﴾ [الدخان: ٤٩]

“Taste (the punishment). You are the powerful, much respected one.”

That is, it will be sarcastically said to the unbelievers who were powerful and feared persons in the world – to suffer torture in Hell.

Altogether, there are some twenty-five forms of the imperative which yield variety of meanings. A jurist will have to know them well-enough, to decide where to apply what, to be able to know what exactly the text is conveying.

The above was in explanation of the *Hukm al-Shar'ī*. We can now take up, albeit briefly, the other two: *Al-Mahkūm Fihi* (the deeds of command) المحكوم فيه and *Al-Mahkūm 'Alayhi* (the Incumbent) المحكوم عليه

5.3 *Al-Mahkūm Fihi* المحكوم فيه (The Deeds of Command)

This deals with the nature of deeds and acts, that are commanded by the *Hakim* (*Shāre' / Law-giver*).

Under this heading, the *fuqahā'* discuss the issue of the conditions of act and deeds. For instance, whether they are within human power or not. They discuss whether there are deeds that are beyond human power such as, habits, love, hatred, or anger. They also discuss the nature of rights of Allah upon His slave, His rights upon Himself, the rights of His creations upon Him, etc. going into great details.

With reference to what is beyond the power of human beings, and what is not, they fix boundaries by discussing the relevant texts. The Prophet said, for example, referring to his love for his wives and his effort to deal with them in an equitable manner, “O Allah, this is the division that is within my power. Hold me not responsible for what You are Able, but I am unable.”

However, and in all appearance, there seem to be acts that are truly beyond the power of human beings. The following *ayah* can be taken as an example (3: 102),

وَلَا تَمُوتُنَّ إِلَّا وَأَنتُمْ مُسْلِمُونَ ﴿١٠٢﴾ [آل عمران: ١٠٢]

“And, die not but while you are submitted.”

Or the Prophet’s advice:

لا تغضب “Do not get angry.”

Both these commands seem to be beyond human power. How can humans remain in a state in which they are never out of submission so that, if they die in an accident, for instance, they should have been in a state of submission? Or, how can they manage never to get angry?

The answer the *fuqahā*’ give is that neither the *ayah* nor the *hadith* is demanding an impossibility. What, for instance, the *ayah* is saying is that a Muslim should always be aware of the truths of his religion, and his mind and heart away from thoughts of deviations and actions grounded in base desires. This is in every man’s power. Similarly, the *hadith* is not saying, “never get angry,” but rather, “control your anger.” Other *ahādith* show how anger can be controlled. This, again, is within the range of human possibility.

Such then, are the topics of discussion under this heading. The *Usul* books, of course, have much more to say, but this article is designed to present a schematic drawing of the discipline and not to draw a portrait.

5.4. *Al-Mahkūm `Alayhi* المحكوم عليه (The Incumbent/The One Obligated/Addressed)

This part discusses those upon whom the command falls, those addressed in the command, in Arabic *Mukallafun* – the incumbent.

The primary characteristic of a person who is obliged to obey is the possession of reason and ability to understand whatever he is being told. A man who is out of his mind, is considered as out of the circle of those addressed. So is a child. Further, only that is incumbent upon a man which he can understand. If he can only understand the principles of this religion, such as *Salāh*, *Zakāh*, etc., then he is questionable for only what he can comprehend. But if he can understand the finer details, such as, for example, finer points of *Tawhīd*, or advanced states of purification of the soul, etc., then he is liable to be questioned about the finer points too.

But the *fuqahā'* do not leave the issue with such simple reasoning and explanation. They go deeper in details. For example, although a child or a lunatic are not addressed by the Law, they are still responsible for what they do; so that, if they destroy someone's property, compensation is obligatory on them. Consequently, if they possess wealth by inheritance, or gift, cost of damages will be paid out of it. To explain, since, although handicapped by the lack of a mind that can think, the *Shari'ah* has allowed them that they own wealth. With that right comes the responsibility. So, although they will not be questioned in the Hereafter for not Praying or fasting, or for destroying someone's property, but the rules of compensation will apply to the last case. At this point, one might appreciate the brilliance of the *fuqahā'*, who dealt with the issues with such thoroughness.

The jurists discuss in detail as to who qualifies (الأهلية) to be addressed, and who does not. Two kinds of qualifications or incumbencies are addressed:

1. *Ahliyat al-Wujūb*, which deals with those obligations that are upon a man, as a man, belonging to the humankind. That is, there are obligations that are incumbent upon every one among mankind – simply because they are humans – whether they are adults, children, free, slaves, men or women or even in the state of a fetus, except that in that state it has no obligations, but only rights. These incumbencies remain applicable until a man's death. In fact,

according to the *Hanafiyyah*, they remain so even after death, so that if he has left debts, his inheritors are required to pay off, either from what he left behind, or out of their own pockets.

2. *Ahliyat al-Adā'*, deals with one's ability to respond to the obligations, or to create obligations upon himself or herself. The *fuqahā'* explain that it covers rituals, interactions, etc. The allusion is to a man creating deeds that the *Shari'ah* treats as those for which he earns rewards or punishments. Of course, this depends on the development of a man's reason. If he loses his ability to reason, the *Ahliyat Adā'* is nullified. Consequently, the *fuqahā'* discuss the case of a child in Islam very much in detail – as to what are his rights, duties, when, at what age, and to what extent; and, what happens when he reaches physical maturity but does not show signs of mental maturity, or worse, acts like a child in his affairs. Most *fuqahā'* believe that a man may not be given charge of his (inherited) wealth even at the age of eighty if he does not evince signs of mental maturity. They also discuss the issues of temporary loss of *Ahliyyah*, such as temporary madness, or acts under the influence of intoxication (e.g. divorce of a drunkard), apostasy, stupidity, ignorance, errors by oversight (e.g., unintentional murder), actions under duress (e.g. forced crime), etc.

Chapter 6

SOURCES OF ISLAMIC LAW

According to the masters of the *Usul*, the following are the sources of Law in Islam:

1. *Al-Qur'an* القرآن
2. *Al-Sunnah* السنة
3. *Al-Ijmā'* (Consensus) الإجماع
4. *Al-Qiyās* (Analogical reasoning) القياس
5. *Fatwa al-Sahābi* (The opinion of a Companion) فتوى الصحابي
6. *Al-Istihṣān* (Improvement through juristic preference) الإستحسان
7. *Al-Masālih* (Public interest) المصالح
8. *Al-Dharā'i'* (Means) الذرائع
9. *Al-Istishab* (Connectivity) الإستصحاب
10. *Shar'u man Qablana* (Legislation of those before us) شرع من قبلنا
11. *Al-'Urf* (Custom) العرف

These are broadly accepted sources. However, a few of them are either not accepted by one of the four schools of *Fiqh* (*Hanafiyyah*, *Shāfe'iyyah*, *Malikiyyah* or *Hanbaliyyah*), or, are not used extensively.

Further, the first four are considered as the main sources. The rest are secondary, not resorted to often. But sometimes, when the first three are exhausted, and a new *Fatwā* is to be issued, one or more of the secondary sources could play a key role. *Istihṣān*, for instance, plays an active role in working out new rulings; while *Istishab* is an important element with the *Shāfe'iyyah*.

Hereunder, we present some explanation that might make things less murky for those who have never studied *Usul al-Fiqh* which, of course, requires the knowledge of Arabic knowledge and an extensive study of the first two sources – Qur'an and *Sunnah* – which, at no point, can be contradicted in law. Some familiarity with the consensus of the Companions is also required.

Chapter 7

SOURCES OF *USUL AL-FIQH*

We have stated above that the principles of the *Usul* have themselves been drawn from the Qur'an and *Sunnah*. The first four of the above have been derived from a single *ayah* of the Qur'an (4: 59):

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأَطِيعُوا أُولِي الْأَمْرِ مِنْكُمْ فَإِن تَنَزَعْتُمْ فِي شَيْءٍ فَرُدُّوهٓ

إِلَى اللَّهِ وَالرَّسُولِ إِن كُنتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا ﴿٥٩﴾

[النساء: ٥٩]

“Believers! Obey Allah, obey the Messenger, and those in authority among you. Should you have a dispute concerning anything, refer it to Allah and the Messenger if you truly believe in Allah and the Last Day. Such a course is better and fairest in conclusion.”

In the above, “*obey Allah*” refers to the Book of Allah, “*obey the Messenger*” refers to the Prophet (after him, his *Sunnah*); “*those in authority*” refers to the *Ijma`* of the scholars (the Companions qualifying by default); the clause “*among you*” refer to the exclusion of non-Muslims; “*refer it to Allah and His Messenger*” refers to *Qiyas* based on Qur'an and *Sunnah*; “*if you truly believe in Allah and the Last Day*” refer to *Wujubiyyat* (obligatory nature of the command); the two ‘*fa*’s in the verse indicate the sequence to be adopted, and the words “*such a course is better and fairest in conclusion*” refer to the correctness of the procedure laid out in the verse.

Other verses of the Qur'an, or relevant *ahādith* could be quoted but length is the prohibitive factor.

Explaining the Sources

7.1. Al-Qur'an

The Qur'an is the final revelation of Allah, which, being inimitable, is incorruptible, and, therefore, untranslatable. It is a miracle which challenges mankind to produce its equal, even if a few verses. Its adversaries have known this for centuries, but are as proud against it and its Author, Allah, as Abu Jahl and his cohorts were – they who preferred to be slaughtered at Badr, rather than accept its conveyer, Muhammad, as the Messenger of Allah, or the message he had brought from on High.

It is the uncreated word of God, no passage of which, however short, can be proven untrue. It is a linguistic, psychological, scientific, and legal miracle, although its literary qualities stand out most. It is guidance for mankind, music to the ear, contemplation material for the mind, *Sakinah* to the heart, and tranquility to the soul.

No part of it, down to its vowel marks, can be ignored or disregarded during the extraction of laws or wisdom from its texts. It says about those who neglect its contents (20: 124-127):

وَمَنْ أَعْرَضَ عَن ذِكْرِي فَإِنَّ لَهُ مَعِيشَةً ضَنْكًا وَمَحْشَرُهُ يَوْمَ الْقِيَامَةِ أَعْمَى ﴿١٢٤﴾
 قَالَ رَبِّ لِمَ حَشَرْتَنِي أَعْمَى وَقَدْ كُنْتُ بَصِيرًا ﴿١٢٥﴾ قَالَ كَذَلِكَ أَنْتَ أَيْتَنَا فَنَسِينَا
 وَكَذَلِكَ الْيَوْمَ نُنسِي ﴿١٢٦﴾ وَكَذَلِكَ نَجْزِي مَنْ أَسْرَفَ وَلَمْ يُؤْمِنْ بِآيَاتِ رَبِّهِ ۖ وَلَعَذَابُ الْآخِرَةِ
 أَشَدُّ وَأَبْقَى ﴿١٢٧﴾ [طه: ١٢٤-١٢٧]

“He who turned away from My reminder, will face in consequence, a wretched life; and We shall raise him on the Day of Judgment, blind. He will say, ‘My Lord! Why did you raise me blind, while I was seeing (in the earthly life)?’ He will answer, ‘That is how: Our signs came to you, but you forgot all about

them. That is how you will be forgotten today.’ That is how We recompense him who breaks the bounds and did not believe in his Lord’s revelations. And, indeed, the punishment of the Hereafter is more severe and longer lasting.”

Hundreds of millions – whose numbers keep rising – can be cited as witnesses to Qur’anic prediction of a wretched life. The Qur’an taunts (59: 2):

فَاعْتَبِرُوا يَا أُولِيَ الْأَبْصَارِ ﴿٢﴾ [الحشر: ٢]

“Therefore, learn the lesson, O those of vision.”

No one ever understood the Qur’an any better than the Prophet. His understanding was simply amazing. If not for lengthening of the article, we would have cited examples. No one ever lived by the Qur’an as he did. No one implemented the whole of the Qur’an, on a community as he did.

After him, it is three generations (known as the *Salaf*), who remained true to the Qur’anic guidance and the Prophetic example. In consequence, they brought down the centuries-old Roman, Persian, and Pagan Empires and their civilizations within, as it were, the batting of an eyelid – on historical scale – and then conquered the minds, souls, and hearts of the people living within their boundaries. They set them on course to cultural, intellectual, moral, and spiritual developments whose effects still reverberate in the world. The way the *Salaf* understood and practiced Islam, no generation did after them. Consequently, wherever we wish to enhance our understanding of the spirit of the Qur’an and *Sunnah* directives, we look into the life of the *Salaf*.

7.2. The *Sunnah*

Allah said in the Qur’an:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا اسْتَجِيبُوا لِلَّهِ وَلِلرَّسُولِ إِذَا دَعَاكُمْ لِمَا يُحْيِيكُمْ [الأنفال: ٢٤]

“Believers! Respond to the call of Allah and His Messenger when He calls you to that which will give you life.”

Those of the misguided ones who reject the *Sunnah*, on grounds that the Qur’an is enough for guidance, may note that the above verse declares that the Prophetic words and practices quicken the spiritually dead, and give life and meaning to culture and civilization.

Those who claim that the *Sunnah* merely repeated what the Qur’an said may note that Allah has addressed the believers and has instructed them to respond to two calls: that of the Qur’an, and that of the Prophet.

The *Sunnah* (lit. ‘the way’) is a body of literature that deals with the Prophet’s words, acts, thoughts, his character and what he approved of.

Running into more than 100,000 trustworthy reports, it is the largest body of text about any individual, by virtue of which, the Prophet’s life is known to such degree and depth of detail, as of no one else on the planet.

People who pattern their lives on his *Sunnah*, have – in the overall – the distinction of leading enviously peaceful lives, although fully involved in its compelling and irksome activities.

Tens (if not hundreds) of thousands were proud to live by his *Sunnah* during the Prophet’s life-time, and millions after him – down to the modern age – are those who preserve his practices by living out the *Sunnah*.

Dozens from his followers wrote down his *Sunnah* during his own life-time, and hundreds of thousands were involved in its codification, understanding, and explanation in generations after him.

Its authenticity checked, re-checked, and rechecked over centuries after centuries, the body of this discipline is more convincing by its inner harmony, than by its external stringent

rules of acceptance. Anyone who knows the *Sunnah* well, can accept, or reject, a new report on the strength of his inner feeling, and, to his delight, discover that his feeling concords with the research results of the *Hadith* Doctors of the past. They declared in the past as authentic what his inner feeling accepts now, and rejected in the past, what his inner feeling rejects now. This is an amazing quality of the *Sunnah*, and increases his confidence in the research of the past.

The *Sunnah* is an addendum and explanation of the Qur'an. In fact, Imam Shafe'i would treat the Qur'an and *Sunnah* as a single source (*Nass*). Nonetheless, the *fuqahā'*, including those of the Shafe'i school of thought, are quite fastidious and somewhat finicky, if not perfectionists, when it comes to accepting a *Hadith* for the purposes of Law – despite their own personal practice of living by every report that has come down as the Prophet's practice. When it comes to Law, they would give none of the latitude they would give to the reports by which they conduct their own lives. They become meticulous. Accordingly, although they accept the authenticity, ranks and status given to the *Hadith* by the *Hadith* experts, they would rather divide the *Sunnah* for themselves into three kinds:

- i. *Tawatur* التواتر (Mass-narrated)
- ii. *Mash-hūr* المشهور (Famously transmitted)
- iii. *Ahad* الأحاد (Singletons)

7.2a. *Tawātur*: These are reports that have been reported by so many narrators of every generation beginning with the first until they were codified, as whose consensus over a false report is unthinkable, unachievable, and impracticable. For example, it is reported of the Prophet that he said, "Whoever fastened a lie upon me may find his abode in the Fire." This has been reported by more than seventy Companions, and hundreds of trustworthy *Hadith* narrators after him. How could so many narrators have gathered together in one place, in secret, and

decided together by consensus that they should fabricate this report, seeing that it is hard to get two people to agree over any issue?

There are two kinds of *Tawatur* reports: (a) *Tawatur Lafzi* (by words) and (b) *Tawatur Ma'nawi* (by meaning), but we restrain ourselves from further explanation.

In matters of doctrine, a *Mutawatir* report is as good as a Qur'anic text, and its denial is as good as denial of the Qur'an. In other words, it affords absolute knowledge (*'Ilm al-Qat'i*).

Anyone who rejects a *Mutawatir* report has, perhaps, a damaged brain, or is a fanatic.

7.2b. *Mash-hur*: This is a report which has been narrated by, say, three or more Companions, but became well-spread through several reporters during the generations that followed.

An example of *Mash-hur hadith* is the one which says, "Allah does not withdraw knowledge by way of withdrawing it back Himself, but rather, through the death of scholars." (Bukhari, Muslim, Tirmidhi, etc.).

A *Mash-hur hadith* affords definite knowledge (*'Ilm al-Yaqini*), but is lesser than *Tawatur* in legal value.

7.2c. *Al-Āhād*: These are reports which did not have several reporters/narrators until they were codified. (After all, after they were codified [and placed in collections such the *Sihah Sittah* – the six canonical works – or other collections], thousands of *ahādith* achieved the status of *Mash-hur* or *Mutawatir*). But they remained *Ahād* for the *Hadith* experts – failing to achieve the status of *Mash-hur* even though they became famously quoted and accepted after the codification. For example, the *hadith*, "Surely, deeds are (judged) by intentions; and a man shall have according to what he intends," is one of the *Āhād*, because it is narrated by none other than `Umar b. al-Khattab as the first narrator. It remains one of the *Āhād* despite the fact that it is in

Bukhari, Muslim, etc. and is on the tongue of every Muslim, and despite narrated by a man like `Umar ibn al-Khattab. This is because the first narrator is one in number. It became wide-spread only after it was included in the collections made by *Hadith* collectors, while *Mash-hur* reports are those which acquired that status before the codification. All others became *Āhād*.

Āhād reports do not attain the status of one affording definite knowledge (*‘Ilm al-Qat`ee*); so that, he who denied one of them does not turn an apostate. He could be simply ignorant, or, his mind incapable of logical reasoning. They afford the meaning – in doctrinal matters – what the *fuqahā`* term as *‘Ilm al-Zanni al-Rājih* (preferred proximate knowledge) and when several *Āhād* of the same meaning can be cited, then it gains in strength.

One might note that a *hadith* can be found in the *Sahīhayn* (Bukhari and Muslim), or even in each of the entire *Sihah* compendiums; yet, if it has a single narrator at the beginning, it is not considered of the same strength by the *Fuqahā`*, as *Hadith* scholars would, who would grade high a *hadith* simply because it is in the *Sihah*. This is being fastidious. But the *Fuqahā`* hold their ground saying that the *Shari`ah* worked out by the legal experts has to win whole-hearted approval of its critics, and they themselves remain least liable to questioning on the Day of Accounts.

The *Hanafiyyah* are a little bit more prudential. Over and above the trustworthiness, and other conditions of narration, they accept for legal purposes only those *Āhād* reports in which the narrator's own practice is not against his report. For example, Abu Hurayrah reports that the Prophet said, "If a dog dips its mouth in one of your vessels, let him wash it seven times, one of them using clean dust." But Abu Hanīfah would not accept this report because Abu Hurayrah's own practice was to wash only thrice.

On the other hand, Imam Malik's rule (as well as that of his master Rabi`a al-Ra'i) for acceptance was that an *Āhād* report should not contradict practice of the Madinans. His reason was that the people of Madinah were better at understanding the *Sunnah* because of their physical vicinity with the Prophet. In fact, according to him, practices of the Madinans are almost like *Tawatur* reports because of thousands involved in practice. However, the other three *Mujtahids* would not agree with him – because of their own technical reasons.

At this point, we may mention that *Mursal* (a report in which the name of the Companions was dropped by the next narrator in the chain), was acceptable to Imam Abu Hanīfah and Malik, but not to Shafe`i and Ibn Hanbal. This is because, Abu Hanīfah and Malik personally knew the *Hadith* narrators from among the *Tabe`iyyun* (in fact, Abu Hanīfah was himself a *Tabe`i*). They knew them well enough to trust them (personalities of spotless character such as Hasan al-Basri, Sa`id b. al-Musayyib, and others). But Imam Shafe`i and Ibn Hanbal came later, and, not having personally known the *Tabe`iyyun*, would not accept a *hadith* they narrated without naming the Companion's name in the chain. This demonstrates how meticulous the *fuqahā'* were.

There are other – and lengthy – rules of acceptance or rejection of the *ahādith* by the *fuqahā'*, but we avoid mentioning them for brevity.

A note about the *Sunnah's* function: Briefly, the *Sunnah* clarifies what sounds ambiguous in the Qur'an, expands on what is stated in brief therein, and particularizes (or specifies) what is stated in it in general terms. Secondly, it adds upon the Qur'an what has been stated there through a *Nass* as a 'principle,' and, commands that which has no *Nass* in the Qur'an. A *hadith* of Muslim says,

عَظَمْنَا رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فَقَالَ «أَيُّهَا النَّاسُ قَدْ فَرَضَ اللَّهُ عَلَيْكُمْ

الْحَجَّ فَحُجُّوا». فَقَالَ رَجُلٌ أَكُلُّ عَامٍ يَا رَسُولَ اللَّهِ فَسَكَتَ حَتَّى قَالَهَا ثَلَاثًا فَقَالَ رَسُولُ اللَّهِ -صلى الله عليه وسلم- «لَوْ قُلْتُ نَعَمْ لَوَجَبَتْ» صحيح مسلم (١٠٢/٤)

“The Prophet addressed us saying, ‘Allah has ordained Hajj on you, so carry out the Hajj. Someone raised a question, ‘Is it every year, O Messenger of Allah?’ He asked thrice. The Prophet answered, ‘Had I said yes, it would have become (an yearly) obligation.’”

7.3. *Al-Ijma`* (Consensus)

Ijma` is the consensus of the majority of *Mujtahidin* over an issue of Law. It was commonly resorted to, or rather, it commonly occurred during the time of the Companions. Abu Bakr came to power through *Ijma`* (although this was not a purely legal case, but it did establish the power of *Ijma`*). Consensus of opinion was also obtained over war against the (a) renegades (*Riddah*) and (b) those who refused to pay the *Zakah* to the State. The rank and file of the *Ummah* has never witnessed consensus of this kind, at any time in its history.

Several issues were settled by consensus of the Companions during their epoch: *Tarawih* is one example, while that ‘the grandmother will take a sixth in inheritance’, ‘a wife’s aunt may not be taken as a wife by her husband at the same time’, ‘a *Muslimah* cannot marry a non-Muslim,’ ‘the non-distribution of the conquered lands among the conquerors,’ (decided after much heated debates), are a few of the several cases settled by *Ijma`* of the Companions.

For an *Ijma`* to be obtained, it is not necessary that the entire population of Muslims, or even an entire body of *Fuqahā`* of the Muslim State should be represented. That is almost impossible to conduct. As Imam Shafe`i has pointed out, getting the *Fuqahā`* together in one place, getting them to agree to any decision (given the latitude that Islam offers), disagreements over who qualifies to

be invited, etc., are prohibitive factors in obtaining the *Ijma`* of the *Ummah*. It is, perhaps, in this sense that Imam Ahmad b. Hanbal is reported to have said that there was never an *Ijma`* over any issue. Perhaps, he meant that after its success during the time of the Companions, *Ijma`* was never so successfully achieved.

At the time of `Umar, for example, the issues used to be discussed in open, (sometimes by simple mention during a sermon), or opinion was invited from all present, or those capable of *Ijtihād* invited for discussion, or a remark made in public, or a practice begun to see how the people would respond. Consensus over *Tarawīh*, for instance, in the manner it is performed now, in the number of cycles, at the time it is performed, was obtained by `Umar by ordering it conducted. He was aware that the Companions, one and all, let alone the *Fuqahā`* among them, were extremely sensitive about religious issues and would never remain silent if there was something, however little, against the word or spirit of Islam. Far from the entire body of the Companions allowing that to happen, when `Umar expressed his thought during a sermon that there should be some restraint on the ever-rising *Mahr* (bridal gift) amount, an old woman reproached him strongly by quoting a verse of the Qur'an (4: 20) and `Umar had to hastily retreat.

Accordingly, we find Abu Hanīfah holding on to the *Ijma`* of the *Fuqahā`* that had been obtained before him, and was especially quite inflexible over *Ijma` al-Sahabah*.

The absence of a few *Fuqahā`* did not affect the consensus because, they could, and did, disagree from their towns of residence – whenever they willed. But they never did, despite being the most knowledgeable, the most pious, most courageous against a wrong. These are, perhaps, the reasons why, according to the *Hanafiyyah*, the Consensus of the Companions has a binding legal value in Islam.

However, not finding consensus of the Companions, the four *Fuqahā'* resort to the *Fatwa* of a *Sahābi*, especially when it comes from a *Faqih* among them.

It might be noted that any *Ijmā'*, although this is only theoretical, which contradicts a *Nass* is invalid. Further, *Ijmā'* can be resorted to in matters involving secondary issues (*Furu'*) alone, and not primary (*Usul*). But, of course, the rules involving *Ijmā'* do not end here. A lot more has been discussed and finalized about the issue, leading to the division into four kinds of *Ijmā'* but which we avoid discussing for brevity.

Validation of *Ijmā'*

Validation of the *Ijmā'* has already been cited from the Qur'an. Another *āyah* can be cited. Allah said (4: 115),

وَمَنْ يُشَاقِقِ الرَّسُولَ مِنْ بَعْدِ مَا بُيِّنَ لَهُ الْهُدَىٰ وَيَتَّبِعْ غَيْرَ سَبِيلِ الْمُؤْمِنِينَ نُوَلِّهِ مَا تَوَلَّىٰ وَنُصَلِّهِمْ جَهَنَّمَ وَسَاءَتْ مَصِيرًا ﴿١١٥﴾ [النساء: ١١٥]

“Whosoever makes a breach with the Messenger, after the guidance has become clear to him, and follows other than the way of the believers, We shall let him do what he chooses, then roast him in Jahannum, an evil destination.”

In the above verse, the words, *“and follow the way of other than the believers,”* may be noted.

The *Hadith* strengthens it. Said the Prophet (*Muwattā'*),

مَا رَأَى الْمُؤْمِنُونَ حَسَنًا فَهُوَ عِنْدَ اللَّهِ حَسَنٌ وَمَا رَأَى الْمُسْلِمُونَ قَبِيحًا فَهُوَ عِنْدَ اللَّهِ قَبِيحٌ

“What the (body of) believers sees as good, is good with Allah, and what the believers see as abhorring is abhorring.”

He also said,

إِنَّ أُمَّتِي لَا تَجْتَمِعُ عَلَى ضَلَالَةٍ

“My *Ummah* will not agree over a wrong.”

This report has been questioned by some, but accepted by the *Fuqahā'* as a trustworthy narration.

7.4. *Al-Qiyās*

This refers to analogical reasoning of the *Fuqahā'*. We add the words “of the *Fuqahā'*” because they coined the word, used it in technical sense, gave a meaning different from the linguistic meaning, and set almost impossible conditions for exercising it; while, many Islamic writers use *Qiyās*, without following its stringent conditions, leading the commoners to believe that their *Qiyās* is as good as that of the *Mujtahidin* of the past.

Although used by some as a synonym of *Ijtihād*, it is vastly different. *Ijtihād* is to do research and arrive at such conclusions, as no *Mujtahid* of his school can dispute with; or, if another *Mujtahid* researched on the same topic, he would arrive at the same conclusions.

The scholars of *Usūl* define it as a tool to derive a rule for which no *Nass* is available in the primary sources, basing the new derivation on another derived rule that has its basis in a *Nass* (explicit text of the Qur'an or *Sunnah*) because of a common characteristic linking them. Thus, *Qiyās* cannot be based on the *Ijmā'* of the *Sahābah*, far from an opinion of one of them – let alone of the later *Mujtahids*.

Accordingly, analogy upon analogy (*Qiyās 'ala al-Qiyās*) is not allowable, although it is a common affair in other legal systems, where “precedence,” is so common that more than the greater part of laws are based on the unchallengeable precedence over precedence.

Validation of *Qiyās*

None other than the Qur'an itself invites the application of *Qiyās*. It said (38: 28),

أَمْ نَجْعَلُ الَّذِينَ ءَامَنُوا وَعَمِلُوا الصَّالِحَاتِ كَالْمُفْسِدِينَ فِي الْأَرْضِ أَمْ نَجْعَلُ الْمُتَّقِينَ
كَالْفُجَّارِ ﴿٢٨﴾ [ص: ٢٨]

“Shall We then, place, on equal footing, those who believed and did righteous deeds, with those who spread corruption in the land? Shall We treat the pious like the wicked?”

Thus, the Qur'an invites us to put analogical reasoning to use. The Prophet also taught his Companions the use of *Qiyās*, and, to be sure, the Companions exercised it quite often in order to find solutions to new problems.

We leave rest of the Islamic Sources of Law not dealt with in detail, because, firstly, they are not much resorted to, and secondly, they are complex issues requiring lengthy discussions. We move on to another topic concerning the principles on which meaning is derived from the texts.

Chapter 8

A FEW RULES FOR DERIVING THE MEANINGS

Those who know Arabic are aware that it is a rich language whose richness is because of the direct meanings, the indirect meanings, the shared meanings, the nuances, and sense (rather than the meaning) that Arabic words and phrases carry. The case is all the more true of the Qur'an, whose usage of the language is of a miraculous nature. It is important, therefore, that rules and principles should be laid out for establishing the meaning of its texts. We shall briefly deal with the issue, drawing from the *Hanafiyy* work known as "*Usul al-Shasi*" ("*The Principles*" of 'Ali Shasi).

***Mabahith al-Lafziyyah* (Discussions Involving 'Words')**

Counting the major divisions alone, words have been divided into sixteen kinds that have rigid rules laid out for them, so that only the meaning intended by the Law-giver is obtained of them – and no other. The definitions (along with explanations and examples), save a jurist from committing errors while he is extracting meanings from the sources. Some of them are:

1. *Al-Khaas* الخاص (the specific),
2. *Al-'Aam* العام (the general),
3. *Al-Mushtarak* المشترك (mutually participating),
4. *Al-Mu'awwal* المؤول (*interpreted*),
5. *Al-Zahir* الظاهر (the apparent),
6. *Al-Nass* النص (above any interpretation),
7. *Al-Mufassar* المفسر (that explained by the context),
8. *Al-Muhkam* المحكم (well-established of meaning),

9. *Al-Makhfi* المخفي (the hidden that can be deciphered)
10. *Al-Mushkil* المشكل (the more hidden of meaning)
11. *Al-Mujmal* المجمل (the synoptic)
12. *Al-Mutashabih* المتشابه (*mutually resembling*)
13. *Al-Haqiqah* الحقيقة (the real)
14. *Al-Majaz* المجاز (the allegorical)
15. *Al-Tasrih* التصريح (*direct expression*)
16. *Al-Kinayah* الكناية (metonymy, indirect expression)

Of these, we shall attempt to explain only the first two.

8.1. *Al-Khāss* (The Specific)

The “Specific” is a word that was coined to express a known meaning, or a known article – intended for that meaning or that particular thing alone. For example, our word for specifying a person called Zayd, or for specifying a class or kind (of creations), e.g. “a man”, or for specifying a species, e.g., “a human.” That is, words, “Zayd”, “a man,” or “a human” belong to the category of *Al-Khāss*. They were coined to give out that meaning. So, in common terms when you said “Zayd”, it is a specific (*Khāss*) person whom you intended.

8.1a. Rules Pertaining to *Al-Khāss*

The rule about a “specific” of the Qur’an is that it is absolutely imperative to act according to its requirement. If a “singleton” report (*Āhād*), or a rule obtained through analogy is in conflict with it, and, if it is possible to reconcile them without effecting any change in the requirement made by the “specific”, then, both will be acted upon. Otherwise, the Qur’anic requirement will have to be met with, and that which contradicts it (of the *Āhād*) will be ignored.

An example of the above is Allah’s words (2: 228),

وَالْمُطَلَّقَاتُ يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ ثَلَاثَةَ قُرُوءٍ [البقرة: ٢٢٨]

“Let the divorced women restrain themselves (to the length of) three Qurū’.”

Now, the word “three” is “specific” for defining a known figure. Therefore, it is imperative to act according to it.

Significantly, the textual “Qurū’” carries both the meanings of period of purity (before or after monthly periods) as well as impurity. It is the context which will determine one or the other in a sentence. Now, if “Qurū’” is understood as alluding to “the state of cleanliness” – as some scholars adopted, basing their opinion on the fact that the word “cleanliness” is masculine while “menstruation” is feminine, and the Qur’an mentions it (i.e., the word “three”) in the feminine form, an evidence that the plural of a masculine refers to “cleanliness,” (if the above is assumed as correct) – then, we will be forced to abandon acting upon a “specific” (word). But the rule is that it is imperative that the *Al-Khass* of the Qur’an must be acted upon.

To explain further, if anyone thought that the word (*Qurū’*) stands for “cleanliness,” he will be making it for two periods of cleanliness and a part of third – the one in which divorce was pronounced – which will not complete the figure of three demanded by the Qur’an. Therefore, the *Hanafiyyah* consider that the word “Qurū’” is in the sense of uncleanliness” i.e., menstruation, because it is then alone that a “specific” term of the Qur’an (*al-Khass* – the word “three”) can be acted upon. Since *Talaq* is to be pronounced during the condition of cleanliness of the woman, three Qurū’ (state of impurity) can be counted after the pronouncement.

8.2. *Al-`Āmm* (The General)

This is the class of words that were coined to express a group (collective noun) either in words, such as: “*Muslimūn*,” or “*Mushriqūn*,” or in particles such as the words, “*mun*” or “*ma*.” So, in common terms, when you say, “*mun*” (who), then that “who” can be any one (*`Āmm*). No specific person can be mentioned through “*mun*.”

Al-`Āmm (the general) is divided into two kinds: (a) an *`Āmm* from which a part has been made or declared *Khass* and (b) an *`Āa* which occurs as an undivided *`Āmm*, i.e. no part of it is declared *Khass*.

We wish we had space to cite examples.

8.2a. Rules Pertaining to *Al-`Āmm*

It demands the same treatment as the *Khass*, that is, it is imperative to act by it when it appears in a Qur’anic text. If it contradicts with one of the *Āhād* reports, then, a reconciliation will be sought, but if that is not possible, then it will be abandoned in favor of the *`Āmm* of the Qur’an. This rule will apply even if the *Āhād* report concerned happens to be in Bukhari, Muslim, and any number of *Sihah* works. It is a *Tawatur* report alone that is excluded from this firm principle. A Qur’anic *`Āmm*, cannot be ignored at any cost, in favor of an *Āhād* report.

For example, the particle “*Mā*” (whatever) in the following *ayah* is general (73: 20) and must necessarily be acted upon:

فَاقْرَأْهُ وَمَا يَنْسُرُ مِنَ الْقُرْآنِ [المزمل: ٢٠]

“Then, recite whatever of the Qur’an is easy (to recite).”

So, a Prayer in which any part of the Qur’an is recited, is valid. Now, if it is contradicted by an *Āhād* report, and reconciliation is

not possible, then the report will have to be ignored; such as the one in *Sihab* works, which has it that the Prophet said,

لَا صَلَاةَ إِلَّا بِفَاتِحَةِ الْكِتَابِ

“There is no *Salāh* without the *al-Fatiha* of the Book (i.e., *Surah al-Fatiha*).”

Now, in view of the fact that a *Sahīh* report cannot also be ignored, the *Fuqahā'* will try to (a) search for the true meaning, (b) seek its interpretation or (c) seek reconciliation.

In this particular case, the other two options are not available, but since a *hadith* report cannot be ignored, a reconciliation is worked out, namely: since the Qur'an demands that any part of it should be recited in the *Salāh* by using the word “*Mā*” (whatever), recitation of any part is declared a “*Fard*”, while recitation of *Surah al-Fatihah*, as demanded by the *Sahīh ahādith*, is declared one position below “*Fard*”, that is: “*Wajib*.”

The above implies that if someone does not recite *Surah al-Fatihah* because of forgetfulness, or because he does not know it by heart, but recites any part of the Qur'an, his *Salāh* is acceptable, except that he offers *Sajdatu al-Sahw* (additional prostrations) for not doing a *Wajib*. On the other hand, if someone knows *Surah al-Fatihah* by heart, but drops it from recitation intentionally, then, his *Salāh* is invalid. He must repeat it for ignoring a *Sahīh hadith*. (Recitation or non-recitation of *Surah Al-Fatiha* behind an *Imam* follows other rules).

Chapter 9

AL-DALĀLĀT الدلالات

DEMONSTRATIVE PRINCIPLES

In the above, we explained the division of words into kinds in accordance with the strength of juridical meaning they contain. Now we take up the words again and divide them in accordance with the kind of demonstrative proofs that they carry, or, as some would say, from the point of view of the clear or unclear meanings that the *Nusus* yield.

9.1. *Dalālat* Pertaining to the *Nusūs*

Those demonstrative principles that are designed to help yield from the textual passages the right meanings, connotations and implications, are broadly of four kinds, with some jurisconsults adding a fifth. They are called:

1. *Ibaratu al-Nass* عبارة النص (*The textual words*)
2. *Isharatu al-Nass* إشارة النص (*The implication of the text*)
3. *Dalalatu al-Nass* دلالة النص (*The demonstrative meaning of the text*)
4. *Iqtida' al-Nass* إقتضاء النص (*The demand of the text*)

Explanation

We shall attempt to explain the first two together. *Ibaratu al-Nass* is that word, or phrase, for which (meaning) the text was specifically brought and which was the prime objective, while *Isharatu al-Nass* is that statement which is not in the passage, but which is clearly implied, without the need to add anything to the *Nass*. For example (4: 3),

فَأَنكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مِمَّنِّي وَتِلْكَ رُبْعٌ فَإِنْ خِفْتُمْ أَلَّا تَعْلَمُوا فَوَكِّدُوا [النساء: ٣]

“Then marry what is lawful to you of the women: two, three or four. But if you fear that you will not do justice, then only one.”

Following the principle of *Ibāratu al-Nass*, it can be stated that this verse was revealed primarily for the purpose of making lawful four wives at a time, with the condition of doing justice to all; and that, if a man is unlikely to do justice to all, he is not allowed to marry more than one; while the principle of *Isharatu al-Nass*, allows us to conclude that (a) doing justice to a single wife is also imperative; and that (b) oppression of one’s wife is disallowed. These meanings are obtained by implication.

Chapter 10

A FEW GENERAL RULES

In addition to strict adherence to the rules of *fiqh*, the jurisconsults also allow certain general principles to play their role while they try to extract the Law from the sources, as they also expect a judge to keep them in mind while pronouncing judgments. Hereunder a few of the many:

One of them says,

1. لا ضرر ولا ضرار

To translate it roughly, “no harm to one, nor to the other.” In practical terms, a jurist carefully evaluates the case on hand in a way to see that ultimately neither party suffers harm. This principle comes into action when, on the suggestion of the jurist, the two litigants, both caught in a case which both hate to have got involved into, agree to make peace between themselves as brothers in Islam, by scaling down demands on each other, and preferring a compromise solution, instead of going by the strict rules of judgment. The judge makes use of their agreement and arrives at a judgment which may, or may not be legally defensible, but he uses the principle of “no harm to one, nor to the other, to settle the issue acceptable to both, though not truly satisfactory to either.”

2. الأصل الإباحة

“The intrinsic principle is permissibility,” that is, basically, all [foods and interactions] are permissible until prohibition is declared. This rule drastically cuts down the work of the *Fuqahā'*. Of thousands of kinds of land, sea, and air food resources that are available for mankind, or thousands of ways in which they interact between themselves, a jurist need not look for permissibility. He has to look for impermissibility, which are few and well-pronounced.

3. دَرءُ الْحُدُودِ بِالشُّبُهَاتِ.

“Avoiding the Capital Punishments with the help of doubts.”

This is actually a directive of the Prophet and a principle which makes it absolutely sure that when a Capital Punishment was executed, it was fully deserved by the incumbent. He always has benefit of the doubt, but that benefit was not available to him in any measure for the judge to have lessened his punishment. The rule suggests that the Judge may actually search for one and, if available, acquit the accused.

4. اليقين لا يزول بالشك.

“Certainty is not eliminated by doubt.”

To explain, if someone has the strong feeling that he is still in the state of cleanliness (*Wudu*) then, some doubt about it will not eliminate the fact that he *is* in a state of cleanliness. Conversely, if someone is strongly suspectful that he is not in a state of cleanliness, then, some off-chance that he might be in a state of cleanliness, will not dislodge the belief that he is not in a state of cleanliness.

5. دَرءُ الْمَفَاسِدِ أَوْلَى مِنْ حَلْبِ الْمَصَالِحِ.

“Prevention of the vicious should have preference over obtaining the beneficial.”

When the vicious and the beneficial clash, and a jurist has to choose one of the two, then, he might choose that which prevents the vicious in preference to that which promises benefits. This is because, as Ibn Nujaym put it, “The Islamic Law is stricter with reference to its prohibitions, than it is over observation of the (virtuous) acts that have been commanded. It might be noted in corroboration that the Prophet said, ‘When I ask you to do something, do it to the best of you ability; but when I prohibit you from something, then, simply desist.’”

Following the above rule, if an unclean man does not find a cover, he might not attempt a wash, even if he is at a river; but rather, may offer the Prayers from that state of uncleanness alone.

Summary

In sum, one can say that extracting Law from the sources is not a simple matter of knowing the Qur'an and *Sunnah*, which is commonly assumed as something any scholar could attempt and succeed. Of course, one has to know the Qur'an and *Sunnah*, but it will have to be accompanied by a thorough understanding of the surrounding details and disciplines. The point was well brought out by Ibrahim al-Baji (the *Zahiri*) when Ibn Hazm told him that he could simplify the Law-making procedure for him. When he asked him how, Ibn Hazm replied: "When an issue is raised, check against the Book. If you did not find the answer, consult the *Sunnah*. If you did not find the answer, look into the *Ijma'*. If that also fails you, then you know the simple rule and the basic principle in Islam is 'permissibility'."

Ibrahim answered him wittily saying,

مَا أُرشِدْتَنِي إِلَيْهِ يَفْتَقِرُ إِلَى عُمُرٍ طَوِيلٍ وَعِلْمٍ جَلِيلٍ، لِأَنَّهُ يَفْتَقِرُ لِمَعْرِفَةِ الْكِتَابِ وَمَعْرِفَةِ نَاسِخِهِ وَمَنْسُوخِهِ وَمُزَوَّلِهِ وَظَاهِرِهِ وَمَنْصُوصِهِ وَمُطْلَقِهِ وَعَمُومِهِ إِلَى غَيْرِ ذَلِكَ مِنْ أَحْكَامِهِ وَيَفْتَقِرُ أَيْضًا إِلَى حِفْظِ الْأَحَادِيثِ وَمَعْرِفَةِ صَحِيحِهَا مِنْ سَقِيمِهَا وَمُسْنَدِهَا وَمُرْسَلِهَا وَمُعْضِلِهَا وَتَأْوِيلِهِ وَتَارِيخِ الْمُتَقَدِّمِ وَالْمُتَأَخِّرِ مِنْهَا إِلَى غَيْرِ ذَلِكَ وَيَفْتَقِرُ إِلَى مَعْرِفَةِ مَسَائِلِ الْإِجْمَاعِ وَتَتَبُعِهَا فِي جَمِيعِ أَقْطَارِ الْإِسْلَامِ وَقَلَّ مَنْ يُحِيطُ بِهَذَا - فتاوى ابن عيش (١ / ٩٥)

"Your advice requires a long life, and an august learning. It requires knowledge of the Book that includes knowledge of the abrogating verses and the abrogated, that which requires (the knowledge of its) interpretation, its apparent, its texts,

its unconditional, its general, and other such details involving its commands and prohibitions. It also requires memorization of the *ahādith*, the knowledge of its *Sahīh*, its weak, its complete chains and broken chains, its interpretations; distinction between its earlier reports and later reports, etc. It also requires that one should know the issues over which consensus was obtained, and, in addition, know how they were received and treated in the entire Islamic world. But few are they who can comprehend all that!”

What he meant, of course, was that it was all not as simple as Ibn Hazm had declared it.

Imam Nawawi said, “A similar statement is attributed to Imam Shafe`i. In fact, questioning Imam Shafe`i’s ruling against a *Sahīh hadith* is the work of a *Mujtahid*.” To be sure, when someone pointed out a case of *Sahīh hadith* being ignored, it was replied that according to Imam Shafe`i, the *hadith* is abrogated (*`Awwamah*, p. 81-3).

Chapter 11

DIFFERENCES AMONG THE *FUQAHĀ'*

People unlettered in religion often ask why the *Fuqahā'* differ between themselves. They do not realize that differences in opinion between the humans is what makes them humans. They have been created different from each other: physically, mentally, emotionally, and spiritually. They have been given reason and the power to choose. Independent reasoning leads them to different conclusions. They are not robots or similarly programmed computers. It is differences that add charm to life, and makes possible for people to gather together at social levels and exchange thoughts to each other's benefits. All social interactions would disappear, as from the lives of animals, without there being differences among the humans. It is a blessing from Allah. He said (30: 22),

وَمِنَ آيَاتِهِ خَلْقُ السَّمَوَاتِ وَالْأَرْضِ وَأَخْتِلَافُ أَلْسِنَتِكُمْ وَالْوَسَائِدِ إِنَّا فِي ذَلِكَ
لَآيَاتٍ لِّلْعَالَمِينَ ﴿٢٢﴾ [الروم: ٢٢]

“And of His signs are the creation of the heavens and the earth, the differences in your language and colors. Surely, in that are signs for those who know.”

Allah also said (11: 118-119),

وَلَوْ شَاءَ رَبُّكَ لَجَعَلَ النَّاسَ أُمَّةً وَاحِدَةً وَلَا يَزَالُونَ مُخْتَلِفِينَ ﴿١١٨﴾ إِلَّا مَن رَّحِمَ رَبُّكَ
وَلِذَلِكَ خَلَقَهُمْ ﴿١١٩﴾ [هود: ١١٨ - ١١٩]

“Had your Lord willed, He could have made the people one community; but they remain disagreeing – save for him whom your Lord showed mercy. That is how He has created them.”

When you have texts of the size of the Qur'an zipped into six thousand and odd verses, and over a hundred thousand *ahādith*, then, when you look back, you have to say thanks to the *Fuqahā'* who, through their brilliance, worked out *Usul al-Fiqh*, saved the *Ummah* from being ripped into bits and pieces with each individual on his own religion, and, so radically different from each other that no mosque could be built to accommodate two. It is the *Fuqahā'* who have, primarily, kept the majority bound together to be offering 'Eid Prayers as one mass of uncountable millions – on the same day, at the same hour, while followers of other religions merely fill their bellies with wine on their days of festivities.

11.1. Differences among the *Salaf*

Differences in opinion were noticed among the Companions during the time of the Prophet himself. When he ordered them to proceed for a new combat after that of Khandaq, saying, "Let them not do their 'Asr (afternoon) Prayers but at (the forts of) Banu Qurayzah," differences arose.

A group of the Companions was late in starting. On the way, they felt that the 'Asr time would elapse if they did not pray – after all, what the Prophet meant was that they should proceed without delay. Another group thought that it wouldn't be right to go against the Prophet's instruction. They prayed pretty late at the forts alone. But when the Prophet was informed of the two groups who differed in understanding his order, and in offering Prayers, he did not reproach any of them. Other examples can be cited.

Differences then, are inevitable, so much so that when Mansur and after him, Harun al-Rashid told Imam Malik that they wished to enforce his *Muwatta'* and other books throughout the Islamic empire, Imam Malik disagreed on grounds that the jurists of different towns (Kufa, Basra, Khurasan, Syria, Egypt) had already issued *Fatawa* (religious rulings) which were popularly being

followed by the people. Enforcement of his own books would, Imam Malik argued, create chaos. Harun al-Rashid – quite a learned person himself – was well-pleased by his answer.

Not surprisingly, we find the Companions differing between themselves immediately after the Prophet's death. They differed over who should be the *Khalifah* – until, after prolonged discussions and persuasions, `Umar kind of cornered them to agree on Abu Bakr. They disagreed over how should they deal with those who refused to pay the *Zakāh* to the State, until Abu Bakr was able to win the learned Companions assembled in the mosque to his point. In fact, if the Companions agreed by consensus over dozens of issues, they also differed over many of them, especially those who had migrated to newly conquered territories. They differed over the issues of waiting period (*`Iddah*), matters of inheritance, oaths, etc. That was absolutely natural, and no one thought any one was wrong because his opinion differed from those in other towns.

Importantly, it might be noticed that differences between the *Fuqahā'* are of minor nature. They do not disagree over *Tawhīd*, *Nubuwwah*, the Revelation, basic creeds, rituals, etc. They do not differ over *Halāl* and *Harām*, over obligations and prohibitions. It is the hotheaded zealots of this or that school who cause divisions in the people over minor issues. The differences among the *Fuqahā'* in any case, have reasons as follows.

11.2. The Qur'an

The texts of the sources allow for several interpretations. As discussed above, the *قروء* of *Āyah* 228 of *Surah al-Baqarah*, is used in the Arabic language both for state of cleanliness as well as for the state of impurity. Accordingly, the rulings differed between those who took one meaning, and those who took the other. Or, consider the following *ayah* (5: 33),

إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ
يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِّنْ خِلْفٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ
ذَلِكَ لَهُمْ حِزْبٌ فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ ﴿٣٣﴾ [المائدة: ٣٣]

“Indeed, the punishment of those who wage war against Allah and His Messenger, and strive to spread disorder in the land is that they be slaughtered, or crucified, or their hands and feet be severed from the opposite sides, or be exiled from the land. This is their ignominy in this life, and for them awaits a mighty chastisement (in the Hereafter).”

In the above text, which deals with highway robbery, there are several options available to a jurist in view of the directive given. He has to choose whether he will deliver all the punishments of slaughter mentioned: crucifixion, severing of hands and feet, and exile, at one and the same time for robbery. Or, does he have the choice of choosing from one of the punishments stated? There were several opinions among the Followers with some treating “aw” of the text as indicating choice, while others not; thus leading to different opinions among them.

To take an example from the *Hadith*, it is reported that the Prophet stood up when a Jewish funeral passed by. Since no one asked him why, there have been several speculations. Some scholars thought that he stood up out of respect, others said that it was because he did not wish to let it go over his head. That led to different rulings about how to respond to the funeral procession of a Jew or Christian.

11.3. The *Hadith*

Evaluation of *ahādith*, their legal values, meanings, and interpretations, strength *vis-à-vis* the Qur’an, along with other

factors, have led to differences in the rulings of the jurists. For *Hadith* Doctors, it is enough if a *hadith* has been evaluated as *Sahih*. But for some *Fuqahā'*, if it contradicts with another, which may not be absolutely *Sahih*, but is narrated by a *Faqih* from among the *Sahabah*, then, it acquires a greater legal value. For them a *hadith* narrated by *Faqih Sahabi* is weightier in legal terms than one narrated by a commoner of them.

For a commoner, a *hadith* found in Bukhari, could be the final word. For some, this comes from their extreme respect for the Prophet, to others because of their extreme respect for the *Sahih* of Bukhari, yet to others because of their ignorance, or to a fourth, because of some fanatical beliefs. But a jurist belongs to none of the groups. His research leads him to an unquestionable and unchallengeable position. He has to sit in the Court and issue a judgment that cannot be questioned or challenged. More than that, when another of the same school sits as a judge in another town thousands of miles away from him, he has to issue the same ruling, involving a similar case. If that does not happen, crisis of confidence will ensue, leading to the abandonment of Islamic system of justice.

Qadi 'Iyad reports in his *Madarik* that Imam Malik asked one of his students whether he accepted *Hadith* from so and so. When he replied in affirmative, Imam Malik remarked, "But I used to take *ahādith* only from the *Fuqahā'*." Indeed, when contradiction occurred, Imam Malik preferred the practice of the Madinans, over a *Sahih hadith*, because, his belief was that the Madinans knew the *Sunan* better than any narrator or collector of *Hadith*. And, this was the rule that even Abu Darda' would apply. When told about a *hadith*, he would remark, "But I have found the people of knowledge practicing differently." (*'Awwamah*).

Imam Waki' b. al-Jarrah once asked scholars around him: "Which narration would you prefer of the two: the one with a chain, 'A'mash, from Abu Wa'il, and he from 'Abdullah b. Mas'ud'; or 'Sufyan Thawri, from Mansur, from 'Alqamah,

Ibrahim, and he from `Abdullah b. Mas`ud'? They said, "That coming from A`mash, because the chain is shorter." Waki` remarked, "Both A`mash and Abu Wa'il are respected *Shuyukh al-Hadith*, but in the second chain, all are *Fuqahā'*, and so, the case is that of 'a *Faqih* from a *Faqih* from a *Faqih*, from a *Faqih*."

Consequently, the weight and value to be accorded to a *hadith* will depend on the quality of a narrator because he understands the *hadith*, while the narrator, or collector, merely reports or collects the *hadith*, sometimes understanding all of its implications, but quite a few times not. The Prophet himself has warned (Ahmad),

رُبَّ حَامِلٍ فِقْهٍ لَيْسَ بِفَقِيهِ وَرُبَّ حَامِلٍ فِقْهٍ إِلَى مَنْ هُوَ أَفْقَهُ مِنْهُ

"Sometimes the carrier of a piece of knowledge is not a learned person; and sometimes, a person of understanding carries a piece of knowledge to someone who is a better understanding person than him."

A good example is the *hadith* about different *Umam* before Islam and *Ummatu Muhammad* (See the *hadith* below under the chapter headed, "Did the *Imams* recommend discarding of their rulings?")

11.4. Language

As pointed out above, Arabic is a complex, rich, and a language of subtleties. The richness comes from the variety of meanings, connotations and nuances that many of its words conceal. Simple words like "الحياة" and "الموت" have been used by the pre-and post-Islamic poets and writers in at least 13 different meanings; e.g. life and death, existence and non-existence; wealth and poverty; honor and humiliation; guidance and misguidance; knowledge and ignorance; fertility and drought; sleep and wakefulness, etc. The word *al-'Ayn* has around 40 meanings. Any two persons who have to deal with vast source texts, are likely to

differ over several fundamental linguistic issues. It was the jurists who reduced the differences drastically.

In addition, treating a text as in the ‘literal sense,’ or ‘figurative,’ can cause differences; and a jurist has to carefully study the evidences presented by both parties, for and against, to decide upon his choice. For example, the Qur’an says,

وَإِنْ كُنْتُمْ مَرْضَىٰ أَوْ عَلَىٰ سَفَرٍ أَوْ جَاءَ أَحَدٌ مِنْكُمْ مِنَ الْغَائِطِ أَوْ لَمَسْتُمُ النِّسَاءَ فَلَمْ تَجِدُوا مَاءً فَتَيَمَّمُوا [النساء: ٤٣]

“And, if you were to be sick or journeying, or one of you has come from the privy, or you have been in contact with women (requiring major ablution), but do not find water, then resort to wiping.”

One question that arises in the above text is whether the word “*lamastum*” should be taken in the literal sense of ‘touching a woman,’ or in the figurative sense of ‘intercourse.’ Those who took one position or the other, had ample reasons for their choice; and thus differences arose between their rulings – both of them of equal merit, if not in unchallengeable positions.

11.5. Differences Because of *Fiqh* Rules

Another cause of differences among the *Fuqahā*’ with reference to legal judgments is that they differed over certain Rules of *Fiqh*. To give a few examples: When a word is capable of both *Haqiqah* (literal) as well as *Majaz* (metaphorical), then, according to the *Hanafiyyah*, *Haqiqah* is to be given preference. But according to Imam Shafe’i, *Majaz* could be given preference. This led the two schools to differ over a few issues, as both had such evidences that it was truly hard to decide which one was heavier.

To cite another example, when an *‘Amm* contradicts a *Khāss* in the *Nusus*, then, according to the *Hanafiyyah*, if the two reports had occurred close in time, then the *‘Amm* will be treated as the

particularized *Khāss*. But if there is a gap of time, then, if *ʿAmm* had appeared later, it would nullify the *Khāss*. Contrarily, if the *Khāss* came later, it would nullify the *ʿAmm*. In such cases, however, it could be so treated only in that part which contradicts the *Khāss*. But, according to the rest of the schools, there can never be a contradiction between *ʿAmm* and *Khāss*; but if there is any, the *Khāss* would be considered as further clarifying the *ʿAmm*. This difference in opinion led to difference in rulings.

Abādith concerning *Zakāh* on agricultural products can be cited as another example. The Prophet had instructed:

مَا سَقَتْهُ السَّمَاءُ ففِيهِ الْعُشْرُ

“One-tenth is due (as *Zakāh*) from out of whatever is watered by the heaven.”

However, another *hadith* says,

لَيْسَ فِيمَا دُونَ خَمْسَةِ أَوْسُقٍ صَدَقَةٌ

“There is nothing as *Zakāh* on any thing less than five *Awsaq*.”

Now, the three schools other than the *Ahnaḥ* believe that the second *hadith* explains the first. The first is *ʿAmm* which is particularized by the second. They believe that the first *hadith* above declares *Zakāh* (on agricultural products) as obligatory, while the second fixes the minimum (*Nisab*). However, the *Hanafiyyah* treat the second as nullified because of the first, which, according to them, was issued later. Consequently, the *Hanafiyyah* passed the ruling that there is no minimum (*Nisab*) for *Zakāh*-obligation on agricultural products. A tenth may be taken out whether the output is more or less, and that it applies to all kinds of harvests (except the quickly perishable).

Of course, they were also influenced by the verse (6: 141),

وَمَا آتَوْا حَقَّهُ، يَوْمَ حَصَادِهِ [الأنعام: ١٤١]

“*And give out its due, on the day of harvest.*”

According to them, a Qur’anic verse cannot be ignored. If it clashes with a *hadith*, and all efforts to reconcile the two fail, then, the Qur’anic directive shall prevail.

Thus, we can see that some differences in rulings arose from differences in *Fiqh* principles. Each school defends its own *Fiqh* rules in such a vigorous scholarly manner that reading the evidences of any one of them leads one to believe that the school’s case has, perhaps, the conclusive proofs, until he has read the second school’s evidences; after which it becomes hard to decide which one to go by; and this conclusion is true for all points – word meaning, *Hadith* evaluation, linguistic reasons, or *Fiqh* rules – over which the *Fiqh* schools differ. Every one of them seems to have irrefutable positions, and, consequently, the differences remain. One suspects that differences are in-built.

The differences have also led to great amount of research throughout the epochs, which have shown that the differences are over minor issues. As for the major issues, there is unanimity over them between the Schools. This goes to increase the confidence of the *Ummah* in the Schools of *Fiqh*. It is in this sense that the following is not infrequently cited – although reported by some as a *hadith*, but actually a saying of the scholars of the past who remarked,

اختلاف أمّتي رحمة

“Differences of my *Ummah*, is a source of mercy.”

Chapter 12

ARE *FIQH* SCHOOLS A CAUSE OF DIVISION?

There are Muslims, especially among the non-Arabs, who have been led to believe that the popular four schools of *Fiqh* are the main cause of disunity among the *Ummah*, which, they tend to believe, need to be summarily abolished. They also believe that the system of study of *Fiqh* at the great universities is fundamentally wrong, where the great books of *Hadith* are read more for the blessing than for revelation of truth!

It might be suggested that this kind of literature deserves to be ignored. But, regrettably, this is the kind of literature which is successfully marketed among the naïve of the youthful class today. It is likely to increase their ignorance, their distance from the *Salaf*, and plant such divisions as which do not exist.

Some of the vocal activists from among them – who prefer to work among the poorly educated Muslims – have the Quixotic recklessness to say that the followers of the *Fiqh* schools can be bracketed together with those about whom Allah said,

وَإِذَا قِيلَ لَهُمْ تَعَالَوْا إِلَىٰ مَا أَنزَلَ اللَّهُ وَإِلَىٰ الرَّسُولِ قَالُوا حَسْبُنَا مَا وَجَدْنَا عَلَيْهِ
ءَابَاءَنَا

“When it is said to them, ‘Come to what Allah has revealed, and to the Messenger,’ they say, ‘Enough for us what we found our forefathers on.’”

They are too ignorant to know the unanimity of the scholars of the earliest generation to the present, that the *ayah* is referring to the pagans of Makkah, and that, to apply it to Muslims is a nasty crime.

The interesting characteristic of those who fall victim to such beliefs is that they fail to realize that when one of them is asked to

abandon the *Fiqh* school he was following, he is not told to start learning Arabic and begin studying the Qur'an and *Sunnah*, but rather, is offered booklets containing rulings of minor contemporary scholars, many of whom are not recognized as *Mujtahids* of any kind or class outside the country of their birth and residence.

As for the divisions in the *Ummah*, increasing by the day, little it is realized that they are not because of the Muslims following one of the four *Madh-habs*, but because of not following any of the *Madh-habs*. Little do the Muslims of today care for what their school of *Fiqh* has to say, concerning whatever they are doing in their everyday life.

Little is also known that those who have abandoned the four *Madh-habs* are deeply divided between themselves, agreeing on nothing except to oppose the *Ahl al-Sunnah wa al-Jamā'ah* (people of the *Sunnah* and the mainstream [Muslims]). It is only antagonism towards the mainstream Muslims which unites those who reject the schools of *Fiqh*, otherwise, a cursory glance at their own *Fatawa* reveal that they are greatly divided between themselves over several issues, as well as over some major issues. This is the natural consequence of their failure to apply any body of *Usul* to the texts while issuing *Fatawa*.

So far as differences in opinion are concerned, they have always been there without causing divisions. As we have mentioned above, when Harun al-Rashid wished to hang Imam Malik's *Muwattā* by the door of the Ka`bah, and enforce his *Fiqh* over the entire Islamic world, Imam Malik confirmed that differences would remain in *Furu`at* since no less than the Companions differed between themselves over *Furu`at*, because of which, different rulings were already current in different parts of the Islamic world, and that each was right in its own way. The enforcement of *Muwattā*, he thought, would only increase confusion and spread chaos. It may also be pointed out that it is not 'differences' *per se* that receive criticism of the *Shāre`*, but

rather, splitting out, conflict, discord, feuding, disunity, and factionalism which are prohibited, not only in religious matters, but in all collective affairs.

The division of the Muslims then, is not because of *Fiqh* schools. The case is just the opposite. Without the influence of the *Fiqh* schools, the *Ummah* would be divided into as many groups as which can accommodate only one man, like it has happened with the Jews and Christians, who, in their religious affairs, 'each is on his own religion.' In contrast, the schools of *Fiqh* have kept the *Ummah al-Muslimah* united. The disunity is because, as the distance between the Muslims and the Qur'an and *Sunnah* grows, ignorance spreads, the refusal to accept the *Salaf* as the guiding light hardens, the willingness to submit to Islam weakens, leading to loss of God-consciousness, and, ultimately to uncompromising attitudes.

The complete unity of the *Ummah* can only be achieved if it turns to the Qur'an and *Sunnah*, accepts to submit to them unconditionally, and thus qualifies itself to receive from Allah its *Taqwa* without which it will make no headway in that direction.

Chapter 13

ARE *FIQH* SCHOOLS SECTS?

Those who are actively working to reduce the influence of the four schools often refer to the schools as “*Firqah*” normally rendered by them as “sects” in English. They have no problem (Khawārij-like) consigning the entire *Ummah* to the Fire by quoting a *hadith* made famous among the masses by them. The Prophet said:

اِفْتَرَقَتِ الْيَهُودُ عَلَى إِحْدَى وَسَبْعِينَ فِرْقَةً وَتَفَرَّقَتِ النَّصَارَى عَلَى ثِنْتَيْنِ وَسَبْعِينَ
فِرْقَةً وَتَفَرَّقَتِ أُمَّتِي عَلَى ثَلَاثٍ وَسَبْعِينَ فِرْقَةً

“The Jews split into seventy-one sects, the Christians split into seventy-two sects, and my followers will split into seventy-three sects.”

The *hadith* is in Tirmidhi, treated *Sahih*, but not in Bukhari and Muslim. There are other versions that promise Fire to all the sects except one; and all these versions are not too trustworthy – not even Albani trusts the other versions.

To go back to the acceptable *hadith*, one might remind that the word *Firqah* of the text is defined as a group which differs with the *Ahl al-Sunnah wa al-Jama'ah* (the mainstream Muslims) over the basic tenets of Islam such as: Allah’s oneness, the Prophet’s messengership, the Qur’an as the final revelation of Allah, belief in angels, past Prophets, past Books, *Qada’ wa Qadr*, miracles of the Prophets, the Resurrection and Judgment, and a few other tenets.

The term *Firqah* cannot be used to identify those who acknowledge the basic creedal features of Islam but follow one of the four schools of *Fiqh*. Anyone who did that may remember that the Prophet said, “When a believer says to another, ‘O *Kafir*,’ then one of them is a *Kafir*.”

Chapter 14

DO THE SCHOOLS STRICTLY FOLLOW THEIR IMAMS?

Few of the common Muslims seem to realize the error in assuming that the followers of *Fiqh* schools follow the *Imams* of their *Madh-hab* in every of their opinions. They imagine, for instance, that the *Hanafiyyah* follow Imam Abu Hanīfah, or the *Shafe`iyyah* follow Imam Shafe`i in every detail. Such ideas are wrong. No human is above error, and, therefore, no *Mujtahid*, even if at the top of the order, can be followed in all that he expressed as his opinion.

The followers of the four *Madhāhib* follow the respective “Schools of *Fiqh*,” and not their founders – this is especially true of the *Hanafiyy* and *Hanbali Madh-hubs*. For quite a few centuries, long after the founders of the four current schools had passed away, the *Mujtahidin* who chose to follow particular schools, attempted fresh and extensive research to firmly establish their rulings, and, on many occasions, differed in opinions with the founders. Imam Zufar, Hasan al-Shaybani, or Abu Yusuf, students of Abu Hanīfah in the direct line, differed with Abu Hanīfah over several issues, and delivered rulings different from him. And, the school adopted the results of the later research as the official position regardless of the opinions that Abu Hanīfah held. They issued *Fatwa* following the later research. But matters did not rest there. Efforts to further refine *Fiqh* issues, was continued by the *Mujtahidin* of every school, in every epoch, and if they differed with those who went before them (known as *Mutaqaddimīn*), then it was they (known as *Muta`akhhirīn*) and their opinions that prevailed. Thus, the schools kept on developing, being refined, and authenticated as long as the *Ummah* kept producing *Mujtahidin* – roughly until the end of the fourth century. When the *Ummah* stopped producing the class of men who could qualify as *Mujtahidin*, and who led spotless and impeccable lives of

Taqwa, Ijtihād had to be wisely discontinued in matters involving the fundamentals of Islam. It is the door to *Ijtihād* in minor affairs (*Furu'at*) that remains open; although, one must add in haste, that with the decline in knowledge and piety, Muslims in modern times do not have confidence in the contemporary *Mujtahidin* of the *Furu'at*, and, instead, often resort to following rulings of the past master-*Mujtahidin*.

Chapter 15

IS *TAQLĪD* UNNECESSARY?

The Prophet left behind him Revelation and his *Sunnah*. The two sufficed his followers of the first, second and third generations. The schools of *Fiqh* began to appear in the second century. So, one may ask, why should he follow one of them? Why should he be a *Muqallid*? Why can't the *Fiqh* schools be abolished?

Such questions, often asked, imply that the understanding of a fundamental issue is flawed. The schools of *Fiqh* were not created by the scholars with the aim of taking the people off the Qur'an and *Sunnah* and gathering the *Muqallidin* around them. It is the presence of *Muqallidin* in large numbers – who demanded the services of the schools of *Fiqh* – which gave reason to their rise. It is not the schools of *Fiqh* who brought the *Muqallidin* into existence. It is the *Muqallidin* who brought the *Fiqh* schools into existence. It is the lack of direct and personal knowledge of the Qur'an and *Sunnah*, with all their intricacies and subtleties, indeed, it is the lack of any knowledge of the Qur'an and *Sunnah*, and further, it is the lack of knowledge of the language of the Qur'an and *Sunnah*, that forces millions upon millions to look for sources from which they can obtain just as much instruction, as will suffice them to conduct daily activities of life without violating Islam.

We may also remind ourselves that there have been millions throughout history, and now hundreds of millions, who, far from knowing the language of the Qur'an and *Sunnah*, are illiterate. To ask them to abandon the *Fiqh* schools, and directly refer to the Qur'an and *Sunnah* to extract the Law, is a ridiculous proposition. Indeed, it is a dangerous proposition, since, unable to refer to the Qur'an and *Sunnah* themselves, they would be left to the mercy, quackeries, and sway of the clergy. They must rather be encouraged to study the Qur'an and *Sunnah*, in order to be

intellectually, morally and spiritually influenced by them. But, in *Fiqh*, they have no option but to follow one of the four Schools.

It is this class of the illiterate who cry loud for the Schools of *Fiqh*. To abandon the Schools of *Fiqh* would lead them into general chaos, ending with the abandonment of Islam itself. As Qurtubi has put it,

تَعَلَّقَ قَوْمٌ بِهَيْدِهِ الْآيَةِ فِي ذَمِّ التَّقْلِيدِ لِذَمِّ اللَّهِ تَعَالَى الْكُفَّارَ بِاتِّبَاعِهِمْ لِآبَائِهِمْ فِي
الْبَاطِلِ، وَاقْتِدَائِهِمْ بِهِمْ فِي الْكُفْرِ وَالْمَعْصِيَةِ. وَهَذَا فِي الْبَاطِلِ صَحِيحٌ، أَمَّا التَّقْلِيدُ
فِي الْحَقِّ فَأَصْلٌ مِنْ أُصُولِ الدِّينِ، وَعِصْمَةٌ مِنْ عِصَمِ الْمُسْلِمِينَ يَلْجَأُ إِلَيْهَا
الْجَاهِلُ الْمُقَصِّرُ عَنْ دَرَكِ النَّظَرِ - تفسير القرطبي (٢/ ٢١١)

“Some people have thought that *Taqlid* stands condemned for the reason that Allah condemned the unbelievers for following their forefathers in falsehood and imitating them in disbelief and sin. This is true when falsehood is involved. As for *Taqlid* in matters true, it is one of the principle of the religion [of Islam], and a pillar for the Muslims to which resorts the ignorant who runs short of a penetrating eye.”

Thus, *Taqlid* is a need and necessity, and is mandated by the Qur'an. It said (16: 43),

فَسْأَلُوا أَهْلَ الذِّكْرِ إِنْ كُنْتُمْ لَا تَعْلَمُونَ ﴿٤٣﴾ [النحل: ٤٣]

“Ask then the people of Remembrance if you do not know.”

It informed us about Yusuf that he said:

وَاتَّبَعْتُ مِلَّةَ آبَائِي إِبْرَاهِيمَ وَإِسْحَاقَ وَيَعْقُوبَ [يوسف: ٣٨]

“(Yusuf said) I follow the religion of my forefather Ibrahim, Is-haq and Ya'qub.”

The above demonstrates that following the forefathers in matters good is appreciated. The Qur'an also said (4: 115),

وَمَنْ يُشَاقِقِ الرَّسُولَ مِنْ بَعْدِ مَا بُيِّنَ لَهُ الْهُدَىٰ وَيَتَّبِعْ غَيْرَ سَبِيلِ الْمُؤْمِنِينَ نُوَلِّهِ مَا تَوَلَّىٰ وَنُصَلِّهِ ۖ جَهَنَّمَ وَسَاءَتْ مَصِيرًا ﴿١١٥﴾ [النساء: ١١٥]

“Whosoever makes a breach with the Messenger, after the guidance has become clear to him, and follows other than the way of the believers, We shall let him do what he chooses, then roast him in Jahannum.”

Following the ways of the “*Mu'minīn*,” the best of whom were the *Salaf* and those who followed them, is thus a thing of virtue; and, one must not ignore the fact that by and large, the *Salaf* were *Muqallidīn* of the *Fuqahā'* among them.

Those who abandon the *Fiqh* schools and follow in place a *Mujtahid* (of the *Furu'āt*) fall into *Taqīd Shakhsī* (following a specific scholar) which is not quite desirable.

A legal expert dabbling with the constitution of a country will not do as much harm as a Muslim legalist of our times will do trying to work out the Law of Islam.

The victims of the call to abandon the four schools fail to understand that the prime sources of Law are four, in which the *Ijma'* of the *Sahāba* is one, and not the individual opinions of the Companions. Now, if the individual opinion of the all-time great figures is not accepted as the source, how can the *Mujtahid* of later times become a source? If the individual Companions of the Prophet are not qualified, how can a contemporary scholar, who is way below in knowledge and piety when compared to them, qualify?

Taqīd on the other hand, is disallowed to him who is at such a level of knowledge as to be able to weigh the proofs, evidences and evaluations, and then work out an opinion that cannot be

challenged by scholars of the same caliber. *Taq̄lid* is *Harām* unto him. In other words, if he is a true *Mujtahid* who can independently extract rulings from the sources, and come up with unchallengeable articles of law, he cannot be a *Muqallid* involving those issues. If he claims to be a *Mujtahid Mutlaq* (absolute *Mujtahid*), he will have to prove to the scholars contemporary to him that he is one. Thereafter, in no affair can he remain *Muqallid*. He must follow his own findings.

Further, he cannot be a low level *Mujtahid*. He should qualify to be a true and real *Mujtahid*, and not someone who can demonstrate his ability of *Ijtihād* concerning a few issues. Finally, as stated above, a *Mujtahid* is one who is so acknowledged by the scholars, and not one acknowledged by the common public.

The difficulties in resorting to one's own *Ijtihād* are so many and so great, that renowned scholars have preferred to remain *Muqallid*, despite their high level of learning and achievement, such as, Imam Tahawi (*Hanafiyy*), Imam Razi (*Shafe'i*), Ibn Hajr (*Shafe'i*), Badruddin `Ayni (*Hanafiyy*), Qurtubi (*Maliki*), Izzuddin b. `Abdussalam (*Shafe'i*), Ibn Taymiyyah (*Hanbali* in major issues), Ibn Kathir (*Shafe'i*), etc.

It is the ignorant who pitches his flag on grounds which the angels fear to tread.

Chapter 16

WHEN IS *TAQLĪD* DISALLOWED?

Taqlid (roughly [blind] following) is disallowed for everyone. Every Muslim's first priority in life should be to obtain as much knowledge (not a simple 'working knowledge') as to be able to extract, from the sources, what would suffice him within his activities of life. If he cannot do that, he may follow one of the schools of *Fiqh*. However, he is not bound to follow his school in every little thing; but rather, in matters where obligations are involved (*Farā'id* and *Wajibāt*). He is not bound to the schools in *Sunan*, *Nawāfil*, *Mustahabbāt* or *Makruhāt*. If he comes across a *hadith* – to give an example – which acts powerfully on him, and it is one of the categories quoted here, he may not wait for its sanction from his school of *Fiqh*. He may straightaway practice it. If he did not, he would be showing his back to the *Sunnah*.

Chapter 17

CHOOSING RULINGS FROM SEVERAL SCHOOLS

Can one choose to follow one school in certain matters, another in other matters, and a third or fourth in yet other matters, shifting from school to school? The question has an obvious answer. On what basis will a commoner choose rulings of this or that *Madh-hab*? Since he has no knowledge of how the rules are derived from the sources, and how the ruling pertaining to the issue of his consideration has been worked out, he is in no position to judge the preferability of one over the other.

If he cannot have his own opinion on the strength of knowledge, he can only shift from one *Madh-hab* to another following his whims, fancies and base desires. But Islam does not approve of opportunism. The Prophet has advised, in a *hadith* evaluated *Hasan Gharīb* by Tirmidhi: “Do not be an opportunist.”

A believer looks for guidance. His objective is to please his Lord, not his ego. He cannot shift from *Madh-hab* to *Madh-hab* looking for the easiest.

To illustrate, he cannot marry a woman following, say, the *Hanafiyy Fiqh* and divorce her by the *Shāfe'i Fiqh*. The courts for example (*Hanbali* in Saudi Arabia; *Hanafiyy* in Turkey; *et al*) cannot judge some cases employing one School of *Fiqh*, and some others employing another School. If it will be incorrect on the part of the courts, how can it be an honest position on the part of an individual?

Yahya al-Qattan said, “If one were to follow every *rukhsah* (the easier alternative) that is in the *Hadith*, he would become a *Fāsiq*”.

Ibn Taymiyyah has quoted, in his *Muswwadah* (p. 518), another statement of this great scholar, an *Imam* of *Hadith* of his times: Imam Ahmad reported that Yahya said, “If someone takes rulings from various sources (and collects together varied

opinions), such as, ‘The Madinan scholars have allowed *Simā`* (music),’ ‘The Kufan scholars have allowed *Nabīdh*, (a light intoxicant)’ and, ‘The Makkan scholars have allowed *Mut`a* (temporary marriage),’ then he will be referred to as a *Fasiq* (a libertine).”

The *Imam* of the *Malikiyyah* in Iraq, Qadi Isma`il b. Is-haq narrates: “I happened to be in the Court of Mu`tadid Billah (3rd century H). He gave me a book to go through (and comment). The author had compiled together all such rulings of the scholars that offered ease. I told him that the writer of the book is a *Zindiq* (a profane heathen). He asked me whether the *ahādith* cited were weak. I said, ‘No, but whoever [of the scholars] allowed *Nabīdh*, did not allow *Mut`ah*, while he who allowed *Mut`ah*, did not allow drugs and music. Now, there is no scholar who did not commit an error. But if someone collected together all the errors, then he is a *Zindiq*.” Mu`tadid understood the point and ordered that the book be burned.” (*Al-Bidāyah wa al-Nihāyah*, 11/87).

Chapter 18

DID THE *IMAMS* RECOMMEND DISCARDING OF THEIR RULINGS?

The common people often hear that the invitation to directly follow the Qur'an and *Sunnah* has come from no less than the *Imams* themselves. The least that can be said about such an invitation is that, as said in Arabic تكليف ما لا يطاق (a task that cannot be shouldered).

The founders of the schools have certainly recommended that their rulings be dropped when they clash with *Sahīh ahādith*. For example, Imam Abu Hanīfah said, "If I have made a ruling which contradicts Allah's book or the Messenger's *Hadith*, reject my ruling." Or, "If a *hadith* is to be found *Sahīh*, then, that is my *Madh-hab*." Similar statements have come from other *Imams*.

Obviously, those who quote these statements have not understood the intent. Or, perhaps, it is the case of:

كلمة حق أريد به الباطل

"A word of truth, whereby falsehood was sought."

By making such statements, the *Imams* were emphasizing the importance of *Sahīh ahādith* and establishing a principle for a situation where a contingency should arise. They were not saying that their rulings might be abandoned root and branch, which is what their antagonists mean to convey.

Further, they were addressing *Fuqahā'* of their caliber. Hāfiz Abu Zur`ah, the Iraqi, explained this:

"A person who has the ability to distinguish between an authentic and inauthentic *hadith*, who is proficient in Arabic language, who knows the *Usūl* sciences, and is aware of the differences among the *Salaf* and the reasons of those differences, then, if he finds a *Sahīh hadith* which

contradicts with one of the opinions of his *Imam*, then he should abandon the opinion of his *Imam*, in favor of the *hadith*.”

As pointed out above, the process of cleansing out the rulings of the *Fiqh* schools from flaws has already been accomplished. If anyone believes that a *Sahih hadith* – even a single one – has been ignored in favor of a personal opinion, and not because the application of *Fiqh* Principles demands allocation of a certain weight to that particular *hadith*, then he is free to present his findings at any international platform, so that he can be shown where he has gone wrong.

This kind of opinion is floored by those who are nominally educated, or are zealots of this or that faction, promoting their own agenda, or are out for gaining leadership. Perhaps they do not know that, Sufyan b. `Uyayna the famous *Taba` Tabe`i* said,

(الحديث مَضِلَّةٌ إِلَّا لِلْفُقَهَاءِ) - الجامع لابن أبي زيد القيرواني. ص ١١٨

“*Hadith* is a pitfall except for the *Fuqahā`*.”

To the above, Ibn Abi Zayd added his comment,

“He [Sufyan] meant that non-jurists might take something in its external meaning, when, in fact, it is interpreted in the light of another *hadith* or some evidence which remains hidden to him; or it may, in fact, consist in discarded evidence because of some other [abrogating] evidence. None can meet the responsibility of knowing this except those who have deepened their learning and obtained *Fiqh*.” (*The Four Imams*, p. 198-99)

A good example of how well the *Fuqahā`* understood the Prophetic reports is the following *hadith*:

عَنْ النَّبِيِّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - قَالَ: «مَثَلُ الْمُسْلِمِينَ وَالْيَهُودِ وَالنَّصَارَى، كَمَثَلِ رَجُلٍ اسْتَأْجَرَ قَوْمًا يَعْمَلُونَ لَهُ عَمَلًا يَوْمًا إِلَى اللَّيْلِ عَلَى أَجْرٍ مَعْلُومٍ، فَعَمِلُوا

لَهُ إِلَى نَصْفِ النَّهَارِ فَقَالُوا: لَا حَاجَةَ لَنَا إِلَى أَجْرِكَ الَّذِي شَرَطْتَ لَنَا وَمَا عَمَلْنَا بَاطِلٌ فَقَالَ لَهُمْ: لَا تَفْعَلُوا، أَكْمِلُوا بَقِيَّةَ عَمَلِكُمْ وَخُذُوا أَجْرَكُمْ كَامِلًا، فَأَبَوْا وَتَرَكَوْا، وَاسْتَأْجَرَ آخَرِينَ بَعْدَهُمْ فَقَالَ: أَكْمِلُوا بَقِيَّةَ يَوْمِكُمْ هَذَا وَلَكُمْ الَّذِي شَرَطْتُ لَهُمْ مِنَ الْأَجْرِ، فَعَمِلُوا حَتَّى إِذَا كَانَ حِينَ صَلَاةِ الْعَصْرِ قَالُوا: لَكَ مَا عَمَلْنَا بَاطِلًا، وَلَكَ الْأَجْرُ الَّذِي جَعَلْتَ لَنَا فِيهِ فَقَالَ لَهُمْ: أَكْمِلُوا بَقِيَّةَ عَمَلِكُمْ، فَإِنَّ مَا بَقِيَ مِنَ النَّهَارِ شَيْءٌ يَسِيرٌ، فَأَبَوْا فَاسْتَأْجَرَ قَوْمًا أَنْ يَعْمَلُوا لَهُ بَقِيَّةَ يَوْمِهِمْ، فَعَمِلُوا بَقِيَّةَ يَوْمِهِمْ حَتَّى غَابَتِ الشَّمْسُ، وَاسْتَكْمَلُوا أَجْرَ الْفَرِيقَيْنِ كِلَيْهِمَا، فَذَلِكَ مِثْلُهُمْ وَمِثْلُ مَا قَبِلُوا مِنْ هَذَا النُّورِ.

“The example of the Muslims, Jews and Christians is like that of a man who hired some people to accomplish a daylong work until the evening on a fixed hire. They [the Jews] worked midway through and then said, ‘We are in no need of your wage you had agreed with us. What we did [so far] was downright waste.’ He said to them, ‘Do not do that. Complete your work and take your full wage.’ But they refused and left. So he hired another set of people in their place and told them [the Christians], ‘Complete this day’s work and you shall have the wage I had promised the others.’ They began the work until when it was the time of `Asr (afternoon) prayer they said, ‘What we did [so far] was downright waste. You can keep the wage you promised us for yourself.’ He told them, ‘Complete your work, after all very little time is left of the day.’ But they refused. So he hired another set of people [the Muslims] to work for him the rest of the day. They worked through the rest of the day until the sun disappeared and fulfilled the wages of the earlier two. That is the example of them, and of what they accepted of this Light.”

This beautiful narrative (one version of which is found in Bukhari) is well in the knowledge of the scholars of the modern time. But how many ever thought, as Abu Hanīfah did, that it

could be used as one of the evidences to demonstrate that the time-gap between `Asr and Maghrib prayers must be shorter than the time-gap between Zuhri and `Asr prayers? This is the meaning of the statement by Ibn abi Layla: “A man does not understand *Hadith* until he knows what to take from it and what to leave.”

To give another example, a *hadith* of Bukhari and others says:

الْبَيْعَانِ بِالْخِيَارِ مَا لَمْ يَتَفَرَّقَا

“Two [people dealing with each other] have the choice [to withdraw from a deal] so long as they do not separate out.”

This led some scholars to believe that a sale purchase deal is finalized only after the two parties have separated out. So long as they are together, in the same positions, they have the choice to withdraw from the deal, even after the deal has been through. But to Abu Hanīfah, the Qur’an comes first, which says,

يَأْتِيهَا الَّذِينَ ءَامَنُوا أَوْفُوا بِالْعُقُودِ [المائدة: ١]

“Believers, fulfill the compacts.”

Therefore, according to Abu Hanīfah, once the two have agreed to a deal, they have entered into a compact from which they cannot withdraw. Physical separation is not an absolute must. Those who wished to depend on the *Hadith* were horrified. But, they had no answer to the question Abu Hanīfah raised: “[Why should separation be necessary?] Supposing the two are in a boat?” In modern times we can ask, “Supposing the two are in an aircraft?” So, what Abu Hanīfah understood from the *hadith* is the spirit of the words, and not the literary meaning. To him, not only “so long as they do not separate out” goes against a Qur’anic injunction, but also, demands that it should be understood in the context of the way business discussions were conducted during the time of the Prophet. The Prophet used an idiom of the time *viz.*, “so long as they do not separate out,” to say, “until the deal is not completely done.”

In today's business dealings, for instance, as soon as a deal is done, one or both the parties ring up their subordinates, or others in business, that the deal is through and that they should immediately take such and such actions. Now, after two hours of sitting together, one of them cannot announce that he is withdrawing from the deal, and argue with this *hadith*. There will be chaos if this is allowed and betrayal of trust. This example demonstrates the differences between the understandings of a *Hadith* collector, and that of a *Faqih*.

No doubt, those who narrated the *ahādith*, completed the task of evaluation and authenticity, and then documented them, did an extremely valuable job. But not always did every one of them fully understand all the implications of that which they were recording. This is because they spent their best time and energy over the issue of authentication. On the other hand, the *Fuqahā'* spent their time deciphering, collating, comparing, and allocating weights to the *ahādith*. Further, they were very conscious of placing the *Hadith* between the Qur'an, which came first to them, and the opinions of the *Salaf*. The former they would never ignore, and the latter they would always consult for the true meaning, interpretation and implication.

Accordingly, Sufyan b. 'Uyayna is reported by Hakim as having said:

وَرَوَى الْحَاكِمُ فِي تَارِيخِهِ عَنْ عَبْدِ الْعَزِيزِ بْنِ يَحْيَى قَالَ: قَالَ لَنَا سُفْيَانُ بْنُ عُيَيْنَةَ: يَا أَصْحَابَ الْحَدِيثِ تَعَلَّمُوا مَعَانِيَ الْحَدِيثِ فَإِنِّي تَعَلَّمْتُ مَعَانِيَ الْحَدِيثِ ثَلَاثِينَ سَنَةً - الآداب الشرعية (٢ / ٢٠٩)

“O collectors of *Hadith*, learn the meaning of the *ahādith*. I spent thirty years learning the meaning of *ahādith*.”

Ibn Wahab said,

“Were it not for Malik b. Anas and Layth b. Sa'd, I would have perished. I was under the impression that everything

that is [authentically] narrated from the Prophet (*saws*) must be put into practice.”

Chapter 19

DID THE *IMAMS* LACK KNOWLEDGE OF *HADITH*?

It is often alleged by the ignorant who dabble in *Fiqh* with ulterior motives that the *Imams* were poor in the knowledge of *Hadith*. A statement more ridiculous than this on this topic is yet to be heard. The following two incidents should be an eye-opener.

‘Abdullah b. Mubarak reported that he happened to meet Al-Awza‘ī in Beyrut. He asked me, “O Khurasani! Who is this innovator called Abu Hanīfah who has appeared in Kufa?” So, I returned to my place, and browsing through the books of Abu Hanīfah, I chose some rulings and discussions over them and then went up to Awza‘ī after three days. He was the *Imam* and *Mu‘adhdhin* of his neighborhood mosque. He saw the book in my hand and immediately asked, “What book is that?” I handed it over to him. He began to read it. Then he went up and said the *Adhan*. Thereafter, he kept reading it until when the congregation time came he inserted it in his sleeve pocket and led the Prayers. After the Prayer, he took it out and continued reading until he finished it. Then he asked me, “O Khurasani, who is this Nu‘man b. Thabit?” I replied, “He is one of those *Sheikhs* I met in Iraq.” He said, “This is a noble scholar. You better benefit from his company.” I told him, “He is the Abu Hanīfah you were preventing me from.” (‘Awwamah and *Tarikh Baghdad*, 13/338).

Muhammad b. Sima‘ah reports that, ‘I used to invite ‘Isa b. Aban (who used to Pray in the same mosque) to attend the gathering around Muhammad b. al-Hasan al-Shaybani (who had been trained by Abu Hanīfah), but he would refuse on the grounds that ‘these are a people who are opposed to the *hadith*.’ One day I introduced him to Al-Shaybani and said, ‘This is ‘Isa b. Aban, a bright man and a goodly scholar of *Hadith*, but refuses to sit in your circle on the grounds that we are opposed to the *Hadith*.’

Muhammad b. al-Hasan al-Shaybani told him not to judge him without having heard him. Thereupon, Ibn Aban asked him about some 25 *ahādith*. Muhammad explained to him each of the *ahādith*, with sufficient evidences, informing him which of them were abrogated, and what were the reasons for abrogation. As we returned, `Isa b. Aban remarked to me, ‘There was a veil between me and Light. I had not known that in Allah’s kingdom, there could be men like him.’ Thereafter, he became an ardent student of Muhammad until he himself became a *Faqih* through him. (‘Awwamah and *Tarikh Baghdad* 11/158).”

Chapter 20

DID THE *IMAMS* USE WEAK *AHĀDITH*?

It is also commonly alleged by those who refuse to follow any *Fiqh* School that the *Imams* used weak *ahādith*. They have gone on to edit the *Fiqh* books of the Schools, to point out that some of the *ahādith* are *Da'if* or altogether untrustworthy. It was an exercise in vain. `Awwamah has discussed this issue in detail. He points out that the books of the *Fiqh* Schools such as *Al-Hidāyah* of the *Hanafīyyah*, *Al-Mughni* of the *Hanābilah*, and others, contain the rulings according to the *Hanafīyy*, *Hanbaliyy* or other schools, but the *ahādith* that have been cited there as the evidences, have been added by the composers of those books who came much later. The *ahādith* cited are not by the *Imam* of the *Madh-hab* such as Abu Hanīfah or Ibn Hanbal, etc. The *Imams* had not presented those *ahādith* as on the basis of which they issued their rulings – which the modern detractor proves inauthentic. The *Imams* had their own reasons, beyond the guesses of their followers of later days, even if those followers were *Mujtahids* in their own right. Accordingly, instead of pointing out that the *ahādith* quoted in such and such *Fiqh* books are weak, a critic should attempt a thorough research over the reasons on the basis of which they were formulated, and demonstrate that those bases were wrong. The *Imams* had their own *ahādith* and other evidences (such as, interpretation of the *ahādith*, or practices of the *Salaf*) to arrive at the rulings and not necessarily those that were added by later composers.

Another error that is committed by the modern day critic of the *Fiqh* books is that they look at the *ahādith* that the *Imams* used, or are attributed to them, and then search for them in the books of *Hadith*. They ignore the fact that these *Hadith* collections had not been compiled at the time of the *Imams*. They came much later. The *Imams* had their own collections, most of the time in their memory. Further, for the collectors of *Hadith*, the narrators

are mere names. But for the *Imams* they were real figures whom they personally knew, had met, and discussed issues with. They had the advantage of judging the worth of a *Hadith* from personal contact and knowledge of the narrators, while *Hadith* collectors did not know the transmitters directly. As for later critics of the *Fiqh* schools who came after the collectors, for them the narrators are just names, with bone-dry evaluation remarks tagged to them. Their knowledge is bookish and indirect, whereas the knowledge of the *Imams* was, in many cases, real and first hand.

To give an example, Hasan al-Basri's narratives are evaluated as *Marasīl* (a kind of *Da'īf hadith*) by the *Hadith* critics because he did not name the Companions from whom he narrated. But Hasan al-Basri knew those personally from whom he reported, but for some reason dropped their names, quoting the Prophet directly. Hasan al-Basri did not suffer from any defect such as loss of memory, senility, or integrity. Yet, the later critics treat his *Marasīl* as weak, while he was the prince of the *Tabe'in*, whose wise statements have been memorized and quoted by scholars for 1400 years. He was regarded so high that his contemporary Ja'far al-Baqir remarked about him, "The man's talks resemble with that of the Prophet."

Thus, in *Hadith* too, the collectors and critics cannot be treated as final authorities on any specific *hadith*. What is weak to them, was fully acceptable by the earliest *Muhaddithin* and *Fuqahā'* of their times.

To give another example, the famous principle,

ادرؤوا الحدود بالشبهات

"Shield the Capital Punishments with the help of doubts," stated in the *Hanafiyy Fiqh* book *Hidayah*, as proven statement of the Prophet, has been treated by later critics as a no statement of the Prophet, but rather a statement of either Mu'adh b. Jabal, or Ibn Mas'ud or others. But, it can easily be supported by *ahādith*.

One of them is the famous incident of Ma`iz Aslami. When he reported his own adultery to the Prophet, he asked him, "Perhaps you merely kissed her," and, "perhaps you merely touched her," etc. The point was, the Prophet was trying to discover whether he could be afforded a doubt, in order to avoid sentencing him to death. Additionally, Imam Abu Hanīfah's own collection of *ahādith* traces the *hadith* through an acceptable chain.

Finally, it must also be known that the *Imams* did occasionally put to use *Da`īf ahādith*. That was because, when they did not find anything to go by, neither the Qur'an nor *Sunnah*, or *Qiyas*, they preferred to use a *Da`īf hadith* in place of their personal opinions.

Chapter 21

DOES *TAQLID* LEAD TO STAGNATION?

The accusation is often leveled against *Taqlid* that it has led to stagnation of the *Ummah*. Alas, such is the intellectual degradation of the *Ummah*. The following may be noted as elucidation:

1. The Revelation (Qur'an and *Sunnah*) left the religion of Islam complete. Those who codified *Fiqh*, did not add or deduct anything from what was revealed. They – the earliest of them, such as the *Salaf*, or those who came after them – merely deduced the Law from sources already available.

2. The Law did not evolve in Islam as it evolved in faiths or systems other than Islam.

3. The Law of Islam deals with the unchanging aspects of human existence. Fathers will always remain fathers; and mothers will remain mothers. Fathers will not bear children, and women will not give birth in nine days, instead of nine months. Therefore, the rights of a parent will remain unchanged, no matter how many millenniums pass over the humankind. Consequently, the Laws and moral instructions of Islam with regard to the parents will remain in force. Wealth will remain in the hands of men and women in varying quantities: some at one extreme end owning huge amounts, and some at the other extreme end owning nothing, with the rest falling in between. Therefore, a system of just distribution of wealth has to be in place if there has to be peace in the society. The Qur'an and *Sunnah* play their vital role in providing the laws, injunctions, directions, and admonitions to allow justice to prevail. These will remain the permanent and inalterable measures in the Muslim society. They cannot undergo alterations without causing injustice and disturbing the peace of the society. In short, there can be no alteration, development,

or evolution of Law in Islam. Evolution of Law is the hallmark of legal systems other than Islamic, because they are constantly exposed to failures coming from application of man-made laws, and from law-evading citizens, who, as atheists, or agnostics, have no fear of a higher Authority ever questioning them.

4. Stagnation in a nation occurs when its people engage themselves in activities that are other than productive. When, Muslim states rich in Allah's bestowals, create a huge network of poultry and dairy products, producing ice-cream in twenty varieties, instead of laying down a network of defense industries producing missiles and anti-drone electronic systems, if they build palaces which are rarely visited by the owners in place of world-class universities, then, these states can be defined as suffering from stagnation. If a bookstall displays, to cite another example, a hundred titles on, say *'Aqidah*, written by contemporary scholars, from multi-volume productions to booklets, while a book or two in each category (multi-volume, standard book size, pocket-size, booklet, brochure) would do, and, on the other hand, those who wrote those hundred titles show no interest in working among the illiterate masses to refine their *'Aqidah*, or write poetry, or novels that dwell upon the core of issues the Muslim societies face, or learn languages and spread out in the lands in the service of Islam, then those scholars and those societies suffer from stagnation. If, to cite yet another example, in the face of enemies of Islam, who broke the political unity of the *Ummah* to pieces by creating small states, then wrought destruction, and now stamp upon the broken pieces, one after another, in the manner of a horde of elephants into an orchard, but the Muslim states engage themselves in suppressing the energies of the youth, converting lions into sheep, then the nations qualify themselves as those suffering stagnation and richly deserve the humility and physical injury, in as rich doses and variety, as their dairy products. Stagnation then, is qualified as a state in which a nation engages itself in

activities that are non-beneficent, non-productive and disoriented.

5. To engage in what the *Ummah* has already brought to full fruition, is an effort about which one can remark, as did an Orientalist in another context that it is: “an ever more perfect re-statement of the stated.” With hundreds of thousands of rulings, covering both major as well as minor issues, the law of Islam was so well-developed during the first four centuries, that any further effort in that direction may lay claim to some minor benefits, but on the whole, has little to be judged by the parameters of wisdom.

6. If 400 years were not enough to codify the Law of Islam, 4000 years will not be sufficient.

7. If this generation has no confidence in the renowned figures of the past, the coming generation will have confidence in neither.

8. *Taq̄līd* in Law is in-built. To follow it blindly is its demand. To find out why and how of it could afford intellectual pleasure, but the engagement of the rank and file of scholars in similar exercises, is stagnation.

9. *Taq̄līd* in matters of Law is a sign of intelligence and good sense. *Taq̄līd* in ideas and ideologies is a sign of intellectual slavery. The *Ummah* entered into stagnancy when it accepted to be slave of the West, blindly following its ideas, philosophy, culture, and civilization. Let alone its elitist class, the religious class of the *Ummah*, including its scholars (but for a few), are as deeply materialistic, if not more, than the West, and, as frozen in mind as Antarctica. This is the consequence of *Taq̄līd*.

10. *Taq̄līd* in Law saves time and energy for pursuing the study of more beneficial (and pressing) disciplines such as: defense sciences, anthropology, psychology, psychiatry, animal

sciences, belle letters, linguistics, deeper study of Qur'an and *Hadith* – and, of course, spiritual development of the self, so sadly lacking among those who dabble in *Fiqh*.

Allah knows best.

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ISBN 978-81-910531-0-4

